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Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication

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In recent years, an increasing number of deportations have taken place through a little-known procedure called stipulated removal, in which a noncitizen agrees to the entry of a formal removal order while waiving the right to an in-person hearing before an Immigration Judge. The federal government has looked to stipulated orders of removal as a partial solution to the mismatch between its enforcement goals and the resources of the immigration court system – a mismatch that, many commentators agree, has reached a state of crisis. Stipulated removal arguably offers some benefits to both the noncitizen and the government, insofar as the noncitizen stands to receive a shorter time in immigration detention and faster removal, while the federal government benefits from efficiency gains and political rewards. This Article, the first academic piece to examine stipulated orders of removal, argues that stipulated orders of removal under current law and practice should not function as a partial solution to the crisis in immigration adjudication. The Article offers an in-depth examination of stipulated removal, which has largely affected unrepresented noncitizens in immigration detention centers who faced severe information deficits during the removal process. Relying on both the illegal re-entry context and the familiar Mathews v. Eldridge *framework, the Article argues that the stipulated order of removal program violates due process, and offers suggestions for reform.*

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I. Introduction

Isaac Ramos had lived in the United States for nearly twenty years, was married to a lawful permanent resident, and had three U.S. citizen children when immigration authorities detained him and placed him in removal proceedings.[1] Two days after being transferred to the Eloy Detention Facility in Eloy, Arizona—550 miles away from Bakersfield, California (where he was apprehended)— Immigration and Customs Enforcement (ICE) officers presented Mr. Ramos with a boilerplate form entitled "Stipulated Request for Removal Order and Waiver of Hearing."[2] The form contained a statement admitting to all the charges lodged against him by the immigration agency, as well as stipulations giving up Mr. Ramos's right to a hearing before an Immigration Judge ("IJ"), his right to apply for relief from removal, and his right to appeal the removal order.[3]

ICE officer Christina Olsen, whose only Spanish language training took place during her training to become an ICE agent, met individually with Mr. Ramos, a Spanish speaker, to explain the request for a stipulated removal order.[4] During her meeting with Mr. Ramos, she asked Mr. Ramos a question in Spanish that she understood to mean, "do you want to fight your case or sign?"[5] Several years later, when Officer Olsen was asked to repeat this same sentence to a Spanish language interpreter in federal district court, the interpreter indicated that the statement was "nonsensical in part" and incapable of translation.[6] On the basis of his conversation with Officer Olsen, Mr. Ramos signed the stipulated removal form. Mr. Ramos never had a lawyer during the process.[7] Neither Officer Olsen nor any government representative ever reviewed Mr. Ramos' file to determine whether he might be eligible for immigration relief or to release from detention on bond. Based purely on a review of the pre-printed form, which stated that Mr. Ramos waived his rights voluntarily, knowingly and intelligently, an IJ found Mr. Ramos' waiver of rights to be voluntary, knowing and intelligent. Within a day, the IJ ordered Mr. Ramos deported, and authorities physically removed him to Mexico.[8] By receiving an IJ-issued removal order, Mr. Ramos was barred from re-entering the United States legally for at least ten years.[9] A year and a half later, federal border agents apprehended Mr. Ramos after he attempted

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[1] United States v. Ramos, 623 F.3d 672, 675 (9th Cir. 2010).

[2] *Id*. at 676-77.

[3] *Id*. at 677.

[4] *Id*. at 678.

[5] *Id*.

[6] *Id*.

[7] Immigrants in removal proceedings are not entitled to government-appointed counsel. *See* 8 U.S.C. § 1229a(b)(4).

[8] *Ramos*, 623 F.3d. at 679.

[9] *See* 8 U.S.C. § 1182(a)(9)(A)(rendering inadmissible an alien who has been previously ordered removed for periods of 5, 10, or 20 years, depending on whether alien had a second or subsequent removal order, has previously been convicted of an "aggravated felony," and on timing of removal proceedings).

to re-enter the United States.[10] Because of the prior removal order, he was criminally prosecuted for illegal re-entry, and sentenced to six and a half years in federal prison.[11]

Isaac Ramos is one of a growing number of noncitizens in immigration detention centers who have been deported through a process known as stipulated removal.[12] Over the past decade, the federal government has substantially expanded and experimented with stipulated removal. Before 2003, a handful of stipulated orders were recorded.[13] But by fiscal year 2008, approximately 30,000 removal orders – nearly one-fifth of all removal orders issued by IJs that year – were stipulated removal orders. [14] Noncitizens who sign requests for stipulated orders of removal agree to the entry of a formal order of removal against them while foregoing a hearing before an IJ, and waiving other rights associated with removal proceedings.[15] Stipulated orders of removal arguably offer benefits to both sides. To noncitizens who do not wish to fight their removal cases, agreeing to a stipulated order of removal offers them a faster removal and therefore less time in detention. To the federal agencies tasked with immigration enforcement and adjudication, stipulated removal provides significant efficiency benefits, political rewards, and potential enforcement clout. Stipulated removal orders arguably move cases more quickly through the removal and detention process, are counted as formal removals, and give the government the power to impose civil and/or criminal penalties on those individuals if they re-enter the country in the future.

For individuals like Isaac Ramos, who are charged with removal by ICE, the alternative to a stipulated order of removal involves appearing for an in-person hearing before an Immigration Judge, often while being detained. IJs, which preside over immigration courts that fall under the direction of the Department of Justice, are responsible for adjudicating deportation cases and process over 400,000 matters each year.[16] In recent years, policymakers, judges, scholars alike have identified a crisis in immigration adjudication, focusing on questions such as the wide disparities in individualized decision-making,[17] bias in the selection process for adjudicators,[18] an overall dearth of professionalism[19] and severe resource constraints in the

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[10] *Ramos*, 623 F.3d at 675.

[11] Reply Brief of United States at 6, United States v. Ramos, No. 09-50059 (Filed Nov. 19, 2009, 9th Cir.).

[12] 8 U.S.C. § 1229a(d); 8 C.F.R. § 1003.25(b).

[13] Data received from Executive Office for Immigration Review (EOIR) (on file with author).

[14] *See* notes 140-43 and accompanying text.

[15] 8 C.F.R. § 1003.25(b).

[16] Executive Office For Immigration Review, U.S. Dep't of Justice, FY 2011 Statistical Yearbook at B2 (2012), available at http://www.justice.gov/eoir/statspub/fy10syb.pdf (showing receipt of 393,185 matters in fiscal year 2009, 392,888 matters in fiscal year 2010, and 430,574 in fiscal year 2011) [hereinafter EOIR, FY 2011 Yearbook]. EOIR defines "matters received " as "the total number of proceedings, bond redeterminations, and motions to reopen or reconsider received by the immigration courts during the reporting period." *Id.* at B1.

[17] *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

[18] *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 374-75 (2006)

system.[20] The government's modern system of immigration detention, too, has become the focus of intense criticism.[21] At the same time, the federal government's immigration enforcement priorities continue to skyrocket, thereby enhancing the demand for the services of the immigration courts and immigration detention facilities.[22]

Do stipulated orders of removal offer a partial solution to the mismatch between the federal government's enforcement goals and the resource constraints of the immigration courts and detention system? This Article argues that they do not, at least not under current procedures and practices. At a descriptive level, the Article draws from thousands of previously confidential government records and data that were obtained through the Freedom of Information Act to provide a close view of the federal government's recent expansion of the stipulated removal program. It highlights several troubling features of the program, particularly for unrepresented immigrant detainees who have been disproportionately affected by stipulated removal. The Article then argues that the stipulated order of removal program, as implemented in recent years, violates procedural due process under the Fifth Amendment, and advocates small but meaningful administrative reforms to ameliorate these problems.

Stipulated removal constitutes part of a broader trend in the immigration enforcement context, in which efficiency takes priority over process. Since 1996, the civil immigration laws have contained a variety of streamlined procedures, in addition to stipulated removal, which enable the government to deport noncitizens while avoiding adjudication before the immigration courts.[23] Increasingly, ICE directly issues removal orders that never come before IJs or other neutral adjudicators. Indeed, in fiscal year 2010, almost two-thirds of all removal orders reported by DHS came directly from the agency, and were not issued by IJs.[24] Another set of

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[19] A number of federal appeals court judges have openly criticized the quality of immigration judge decisionmaking. *See, e.g.*, Guchshenkov v. Ashcroft, 366 F.3d 544, 560 (7th Cir. 2004) (Posner, J.) (criticizing immigration judge's analysis as "one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum."). *See also* Michelle Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 471 (2008) (arguing that crisis on immigration bench implicates judicial ethics).

[20] Chicago Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts* (May 2009), available at http://www.asserlaw.com/articles/article_164.pdf.

[21] Dora Schriro, U.S. Dep't Homeland Sec'y, *Immigration Detention Overview and Recommendations* at 4 (2009).

[22] Dep't of Homeland Security, 2010 Yearbook of Immigration Statistics at 94 (2011), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf (showing five-fold increase in number of removals from fiscal year 1996 to 2010) [hereinafter DHS, 2010 Yearbook].

[23] Other forms of removal employed in the civil immigration context include expedited removal, 8 U.S.C. § 1225(b) (indicating that certain aliens arriving at ports of entry "shall" be ordered removed "without further hearing or review"); reinstatement of removal (providing for removal, without right to immigration court hearing, for noncitizens apprehended in the United States after the receipt of a prior removal order), 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8(a); and administrative removal (which applies for immigrants who are not lawful permanent residents and who have convictions that are aggravated felonies). 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1.

[24] See DHS, 2010 Yearbook at 94 (showing 387,242 removals); Executive Office for Immigration Review, Dep't of Justice, FY 2010 Statistical Yearbook D2, Q1 (2011), available at http://www.justice.gov/eoir/statspub/fy10syb.pdf

procedures takes place in the criminal courts.[25] The criminal justice system has thus witnessed a rise in the use of various plea bargaining arrangements with noncitizens to ultimately obtain criminal sanctions and physical removals. Examples include the conditioning of removal orders as part of plea bargains in federal criminal prosecutions (for immigration and non-immigration offenses),[26] and the use of fast-track pleas and group plea colloquies in illegal entry prosecutions in certain border states.[27] These practices have remained relatively underexamined in the legal scholarship, with the academic literature on immigration adjudication generally centering on the

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(suggesting that immigration judges entered 138,864 removal orders that were not grants of voluntary departure) [hereinafter EOIR, FY 2010 Yearbook].

[25] It is worth acknowledging that the expansion of stipulated removal, a civil immigration enforcement mechanism that amplifies the government's criminal enforcement power for immigration violations, has implications for the growing literature on the overlap between the criminal and immigration laws. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469, 494-96 (2007) [hereinafter Legomsky, *Asymmetric Incorporation*]; Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011) [hereinafter Markowitz, *Deportation is Different*]. Indeed, stipulated removal constitutes yet another example of what Stephen Legomsky calls the "asymmetric incorporation" of criminal law into immigration law, in which the policies and practices of criminal law have seeped into immigration enforcement, even though immigration law has simultaneously failed to incorporate the procedural protections of criminal law. *See* Legomsky, *Asymmetric Incorporation*, at 494-96 (describing other forms of "criminal-style plea-bargaining" in immigration law).

[26] 8 U.S.C. § 1228(c)(5). Under a stipulated judicial order, a federal district court judge has the authority to enter a removal order as a condition of a plea agreement, probation, and/or supervised release. The use of stipulated judicial orders of deportation has appeared most prominently in several high-profile workplace raids of immigrant workers. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE U. L. REV. 651, 669-704 (2008) (describing use of stipulated judicial orders of removal in conjunction with immigration raid on Postville, Iowa meatpacking plant). Stipulated judicial orders under 8 U.S.C. § 1228(c)(5) raise several issues in common with stipulated orders of removal, including allegations of pressure and government agents' reliance on misinformation and lack of access to counsel in order to obtain concessions to final orders of removal. *See id.* at 687. A full discussion of stipulated *judicial* orders of removal, entered at the same time as criminal proceedings and under the authority of 8 U.S.C. § 1228(c)(5), are outside the scope of this Article, which focuses primarily on stipulated removal orders entered during the civil immigration enforcement process pursuant to 8 U.S.C. § 1229a(d) and 8 C.F.R. 1003.25(b). This Article uses the phrases, "stipulated order of removal" and "stipulated removal" interchangeably to refer to the latter process only.

[27] In certain states along the U.S.-Mexico border, the aggressive criminal prosecution of of all migrants crossing the border under a program known as "Operation Streamline" has led to a proliferation in the use of group guilty plea hearings in order to control federal district court backlogs. Operation Streamline's effect on criminal proceedings shares similar themes as the use of stipulated orders of removal in the immigration context, in the sense that both are driven in part by a perceived shortage of detention space, overwhelmed court calendars, and the government's enforcement priorities, and both suffer from due process concerns. For a helpful description of Operation Streamline, see Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481 (2010). Given the dearth of literature on stipulated orders of removal, this Article does not set forth a full account of the parallel use of abbreviated procedures in both immigration and criminal law, although this area is ripe for further development. Ingrid Eagly has examined the practical effects of current immigration enforcement on the criminal justice system, and suggested that a "criminal immigration enforcement" system that takes place in the criminal law setting but incorporates the relaxed rights and procedures of immigration law has emerged. *See* Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

quality of adjudication in cases pending before IJs. This Article focuses exclusively on stipulated orders of removal in immigration courts, and supplies a missing piece in the scholarly literature on immigration adjudication.[28]

Despite the growth of stipulated removal during the late 2000s, the use of stipulated orders of removal has until recently remained largely hidden from public scrutiny and almost entirely absent from scholarly discussions related to immigration.[29] Nonetheless, stipulated orders of removal are gaining judicial and public attention. In September 2010, the Executive Office for Immigration Review (EOIR), the federal agency comprised of the immigration courts and judges, issued an internal policy memorandum in which it encouraged the greater use of stipulated removal orders.[30] In the same month that the executive branch endorsed the stipulated removal program, the judicial branch questioned it. In *United States v. Ramos*, the Ninth Circuit Court of Appeals found that the stipulated removal order entered against Isaac Ramos violated procedural due process and agency regulations.[31] A year later, the nation's first comprehensive advocacy report (which I co-authored) detailing the government's implementation of stipulated orders of removal confirmed many of the concerns that immigration advocates had previously voiced over the program.[32]

This Article ultimately critiques the government's treatment of stipulated removal as a solution to current crises of immigration adjudication and detention, and argues that the entry of stipulated removal orders on unrepresented immigrant detainees who never appear before an IJ

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[28] Jill Family has initiated a scholarly conversation on "diversions" from the immigration court system, and has persuasively asserted that "[t]he problems facing the adjudication system do not justify intensifying executive power over immigration law through the use of diversions." Jill Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L. J. 595 (2009). Family identifies stipulated orders of removal as an example of such diversions, and briefly evaluates them against administrative law principles. *See id.* at 616-17.

[29] *See id.*

[30] The memorandum was accompanied by stipulated removal forms and procedures, which had been developed collaboratively between EOIR and ICE. Memorandum from Brian M. O'Leary, Chief Immigration Judge, to All Immigration Judges, Court Administrators, Attorney Advisors, Judicial Law Clerks and Immigration Court Staff, subject: Operating Policies and Procedures Memorandum 10-01: Procedures for Handling Requests for a Stipulated Removal Order (Sept. 15, 2010), available at www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf [hereinafter *Stipulated Removal OPPM]*.

[31] United States v. Ramos, 623 F.3d 672 (9th Cir. 2010).

[32] Jennifer Lee Koh, Jayashri Srikantiah and Karen Tumlin, *Deportation Without Due Process* (2011), available at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf. Prior to the release of *Deportation Without Due Process*, a number of advocates had expressed concerns about the growing use of stipulated orders of removal but none had set forth detail about the government's operation of the program. *See, e.g.*, *Hearing on Border Crossing Issues Before the Subcomm. on Border, Maritime, and Global Counterterrorism of the H. Comm. on Homeland Security*, 110th Cong. (Mar. 16, 2007) (testimony of Christina Fiflis, American Bar Association) (testifying, with respect to stipulated orders of removal, that "detainees who may in fact be eligible for immigration relief . . . perceive that they have no other choice but to sign the order."); National Immigrant Justice Center, *Policy Brief: Data Suggests Language Barriers Lead Immigrants to Waive Right to Hearing Before Deportation* (2008), available at http://www.immigrantjustice.org/publications/policy-brief-stipulated-orders (describing case of Colombian immigrant who signed stipulated order of removal but did not understand consequences, despite fact that she had valid claim for political asylum).

constitutes a violation of procedural due process. Part II provides relevant background and context for stipulated removal by explaining the rights and protections that potentially apply to noncitizens and generally only become real in immigration court hearings before IJs, and describes the factors that have contributed to the crisis in immigration adjudication. Part III highlights the legal framework surrounding stipulated removal, and discusses stipulated removal's regulatory and statutory history. Part IV provides a descriptive account of stipulated removal's implementation, drawing largely from internal government records and data. Part V examines the due process concerns that are implicated by stipulated removal, both through the lens of recent developments in illegal re-entry criminal prosecutions as well as through the standard procedural due process framework set forth by the Supreme Court in *Mathews v. Eldridge*. The Article concludes with policy recommendations, with a focus on recommendations that may take place through the executive branch, without Congressional action.

II. The Context: Removal Proceedings Before Immigration Courts

The following Part sets forth the context in which stipulated orders of removal have arisen: modern immigration adjudication. It first discusses how for many noncitizens, particularly the majority who do not have legal representation, what few procedural rights they possess under relevant statute, regulations and the Due Process Clause of the Fifth Amendment are enforced by the immigration courts. Although the immigration laws leave many noncitizens without defenses to removal, those same laws are sufficiently nuanced and complex that a substantial number of immigrants who face charges of removal may, upon further examination, have claims to release from detention, relief from removal, or to termination of the proceedings. This Part then proceeds to discuss the institutional challenges facing immigration adjudication, which are significant, if not overwhelming. At first blush, stipulated orders of removal may seem to offer a partial solution to the challenges plaguing the immigration courts and detention system. However, as demonstrated in following sections, stipulated removal in its current form is too flawed to serve as a remotely viable answer to the immigration adjudication crisis.

a. The Standard Process: Noncitizens' Rights and Immigration Judge Duties

A well-established maxim of immigration law dictates that because removal is a civil sanction and distinct from criminal punishment, the constitutional rights typically associated with criminal proceedings do not apply.[33] The civil administrative context in which removal proceedings take place confirm their technically non-criminal nature. Immigration courts are part of the Executive Office for Immigration Review (EOIR), a sub-agency of the Department of Justice (DOJ). Immigration and Customs Enforcement (ICE), a sub-agency of the Department of Homeland Security (DHS), prosecutes removal cases. Appeals of immigration court decisions

[33] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893). The courts' rigid treatment of deportation as a non-criminal sanction has been widely criticized, but nonetheless upheld since *Fong Yue Ting*. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 313 (2000); Peter Markowitz, *Straddling The Civil-Criminal Divide*, 43 Harv. C.R.-C.L. L. Rev. 289, 295, 338, 346 (2008); Markowitz, *Deportation is Different*, *supra* note 25.

go to the Board of Immigration Appeals (BIA), and only reach the federal judiciary through petitions for review to the federal courts of appeal, whose jurisdiction over immigration matters is generally limited to constitutional questions or questions of law.[34]

Procedural protections in removal proceedings are limited in comparison to criminal proceedings, but nonetheless remain relevant and retain their constitutional gravitas through procedural due process. In 1903, the Supreme Court held that procedural due process applies to deportation hearings,[35] a principle to which the Court has consistently adhered.[36] The Court has stated, for instance, that "[o]nce an alien enters the country, . . .the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." [37] Indeed, procedural due process claims have become a focal point of many challenges to deficiencies in the removal process, operating as a substitute for constitutional claims that the courts do not recognize, in large part because of the doctrine that Congress has plenary, unreviewable power over the immigration laws.[38] For instance, the Fifth Amendment has become a stand-in for other constitutional criminal protections,[39] such as the right to counsel (including effective assistance of counsel) under the Sixth Amendment,[40] the right to unreasonable searches and seizures under the Fourth Amendment,[41] and the constitutional right to discovery.[42]

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[34] Questions of fact or discretionary decisions are not appealable to the federal courts. *See* 8 U.S.C. § 1252(a)(2); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Fact-Law Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57 (2010).

[35] Yamataya v. Fisher, 189 U.S. 86 (1903).

[36] *See also* Bridges v. Wixon, 326 U.S. 135, 154 (1945) (Deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom… [m]eticulous care must be exercised lest the procedure by which [the alien] is deprived of that liberty not meet the essential standards of fairness."); *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.")

[37] Zadvydas v. Davis, 533 U.S. 678, 679 (2001).

[38] See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Right*s, 92 COLUM. L. REV. 1625, 1637 (1992) (describing "procedural due process claims as an exception to the plenary power doctrine"); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST'L. L. Q. 925, 931 (1995) (describing "the applicability of procedural due process in deportation cases" as "[o]ne clear exception to the principle of plenary congressional power [that] emerged early on.")

[39] *See* Anne R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 491, 493 (2011) (arguing that courts should continue to rely on due process to "ensure that immigration proceedings are fair, just and sufficiently transparent" rather than seek to expand the application of the Sixth Amendment).

[S] *See* Matter of Lozada, 19 I&N Dec. 637 (BIA 1988) (allowing ineffective assistance of counsel claims in removal proceedings under Fifth Amendment).

[41] Although the Supreme Court has held that the Fourth Amendment does not apply in the immigration context, it and other courts have also suggested that "egregious" Fourth Amendment violations of the Fourth Amendment should lead to application of the exclusionary rule. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984). The Fifth Amendment also provides an avenue for the suppression of illegally obtained evidence in removal proceedings. *See* Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980). *See also* Jennifer Chacon, *A Diversion of*

Procedural due process has also animated a number of statutory rights that apply to immigration proceedings. In its current form, section 240 of the INA sets forth the requirements for immigration court proceedings, including protections that apply to all noncitizens facing removal.[43] For instance, immigrants have a statutory right to counsel (at no government expense), the right to examine the evidence presented by the government, the right to cross-examine witnesses, and the right to present evidence.[44] These rights only become a reality when the immigrant appears for a court hearing. Similarly, the right to appeal an IJ's decision is protected by statute, grounded in procedural due process, and require adjudication before an IJ in order to be made real.[45]

Despite the harshness and blunt force with which the immigration laws generally operate,[46] removal proceedings can lead to surprising outcomes even where immigrants are not eligible for relief from removal. For instance, because ICE has the burden of proving by clear and convincing evidence that an immigrant is deportable,[47] the noncitizen can contest the factual allegations and legal grounds of removability charged by the agency.[48] For lawful permanent residents charged with removal based on a prior criminal conviction, arguing that a conviction does not fall within the statutory ground articulated by the federal immigration laws may operate as a particularly critical defense strategy because the immigration statute may leave the noncitizen with no other options.[49] If the charge of removability cannot be sustained, then the IJ

Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 DUKE L.J. 1563, 1624-25 (2010) (questioning institutional competence of immigration courts to hear exclusionary rule claims) [hereinafter Chacon, *Diversion of Attention*].

[42] *See* Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (finding failure of government to provide copy of noncitizen's "A file" violated Fifth Amendment due process).

[43] *See generally* 8 U.S.C. § 1229a.

[44] 8 U.S.C. § 1229a(b)(4).

[45] 8 U.S.C. § 1229a(c)(5).

[46] Many have commented on the draconian and confusing nature of the immigration laws, particularly the way in which drastic changes to the laws in 1996 left large swaths of individuals subject to removal without the option of discretionary relief. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts on Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY (2006).

[47] 8 U.S.C. § 1229a(c)(3)(describing burden of proof for deportable aliens).

[48] The charges are listed on a document known as the Notice to Appear. *See* 8 U.S.C. § 1229(a).

[49] Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, __ GEO. IMMIGR. L. J. __ (2012, forthcoming) (explaining emergence of categorical approach as critical defense strategy in removal proceedings involving prior convictions)(manuscript on file with author).

may terminate the proceedings altogether. Similarly, a defective charging document could also enable the noncitizen to avoid deportation.[50]

Even if deemed removable, in some cases the noncitizen may apply for relief from removal. A *pro se* immigrant may not learn about the opportunity to apply for relief until she sees the judge, as federal regulations impose an affirmative obligation on the IJ to inform the immigrant of any apparent eligibility for relief from removal.[51] Indeed, an IJ's failure to inform the noncitizen of the right to apply for relief can rise to the level of a due process violation.[52] Although immigration laws enacted in 1996 drastically narrowed the categories of individuals who are statutorily eligible for relief from removal, EOIR's reported statistics nonetheless suggest that meaningful numbers of individuals apply for relief, are granted relief, or have removal proceedings against them terminated. In fiscal year 2011, over a quarter of all immigration court cases resulted in either the positive grant of relief that allowed the noncitizen to remain in the United States or in termination of the proceedings altogether.[53] In order to receive relief or have proceedings terminated, though, the noncitizen must generally have her case adjudicated by the immigration court.

Although many forms of relief from removal enable the noncitizen to remain in the United States, voluntary departure – in which the noncitizen agrees to leave the country in exchange for not having a formal order of removal entered against her–is also a common outcome that provides the noncitizen with important benefits over a removal order. In fiscal year 2011, nineteen percent of all immigration court proceedings resulted in the grant of voluntary departure.[54] Like stipulated removal, voluntary departure allows the government to obtain a speedier departure while avoiding the costs of the removal process (such as detention or obtaining travel documents). However, in sharp contrast to stipulated removal, a grant of voluntary departure avoids the legal consequences of a formal removal order such as bars to lawful re-admission in the future and the possibility of criminal prosecution for illegal re-entry. Like many other forms of relief, noncitizens faced with the prospect of deportation may not know prior to seeing an IJ whether they can seek voluntary departure or be familiar with its benefits.

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[50] *See* 8 C.F.R. § 239.2(c).

[51] 8 C.F.R. § 1240.11(b).

[52] *See infra* discussion accompanying notes 230-37.

[53] EOIR, FY 2011 Yearbook at D2 (showing 11.6 percent of all cases resolved by termination, and 14.4 percent of all matters in a grant of relief not including voluntary departure by an immigration judge, in fiscal year 2010). Termination might also result if a noncitizen received discretionary relief in which Citizenship and Immigration Services, an immigration agency distinct from the immigration courts, had jurisdiction over the application. Note also that while 14.4 percent of all cases resulted in the positive grant of relief, twenty-four percent of all matters before the immigration courts involved an application for relief, meaning that in nearly a quarter of all cases the noncitizen attempted to obtain relief. *Id*. at N.

[54] EOIR, FY 2011 Statistical Yearbook at Q1.

Immigration detention during the pendency of one's removal proceedings, and even throughout the appeals process, is a harsh reality. In some cases, the option of release on bond may exist only if the noncitizen appears before an IJ. Mandatory detention statutes require ICE to categorically detain many noncitizens with prior criminal convictions, if those convictions fall within statutorily-enumerated categories.[55] When mandatory detention applies, the IJ generally lacks the discretion to order the release of the individual on bond. However, possibilities for release from detention do exist. A noncitizen who proceeds with an immigration court hearing may learn that he or she is eligible for bond by showing that the mandatory detention statute does not apply.[56] Another statutory provision authorizes ICE to detain almost any noncitizen charged with any ground of removal, regardless of criminal history.[57] However, immigrants detained under non-mandatory detention provisions remain eligible to request bond hearings before an IJ, in which successfully showing that one is neither a flight risk nor a danger to the community enables may lead to release on bond (or on lower bond).[58] Bond redetermination hearings thus account for a substantial portion of the immigration courts' docket, with judges receiving almost 77,000 bond matters in the last fiscal year.[59]

Immigration court hearings thus offer minimal, but significant, protections to noncitizens facing deportation. But as the next section illustrates, the current system of immigration adjudication also faces immense obstacles to processing the growing number of cases before it.

b. Modern Pressures Facing Immigration Courts

Many commentators acknowledge that the immigration court system is in a state of crisis and in dire need of reform.[60] A number of forces explain why the government has looked to stipulated orders of removal to help alleviate the pressures burdening the immigration courts.[61] This section briefly sets forth these interconnected pressures, which include rapidly intensified immigration enforcement, resource constraints in the immigration courts, the perceived need for

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[55] *See* 8 U.S.C. § 1226(c)(1). *See also* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010).

[56] Matter of Joseph, 22 I&N Dec. 799 (BIA 1999*). See also* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 Colum. L. Rev. 1833, 1850-51 (2011) (describing, and identifying procedural shortcomings in, "Joseph" hearings).

[57] *See* 8 U.S.C. § 1226(a).

[58] *Id.*

[59] EOIR, FY 2011 Yearbook at B7.

[60] *See, e.g.*, American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010); Chicago Appleseed, supra note 20.

[61] For instance, the former Commissioner of ICE in 2006 testified to Congress that the agency would explore practices like stipulated removal, in order to "short-circuit the removal process." Hearing on Fiscal Year 2007 Appropriations for the Secure Border Initiative, Immigration Customs and Enforcement and Customs Border Protection: Hearing Before the Subcomm. On Homeland Security of the H. Comm. on Appropriations, 110th Cong. (Apr. 6, 2006) (statement of Julie Myers, Commissioner, Immigration and Customs Enforcement).

greater detention bed space, the fiscal costs of immigration enforcement, and the lack of access to counsel for noncitizen respondents.

Immigration enforcement today is at an all-time high. In fiscal year 2011, the federal government ordered 396,906 individuals removed,[62] nearly double the number from 2001.[63] During the 2000s, the Bush Administration escalated immigration enforcement in the interior parts of the country through the use of workplace raids and greater collaboration with local law enforcement to carry out immigration objectives through the limited, but controversial, use of 287(g) agreements.[64] Under the Obama Administration, immigration enforcement has continued, and arguably intensified, to include the national deployment of local-federal law enforcement collaborations through programs such as Secure Communities, and overall removal numbers that surpassed the Bush Administration.[65] Indeed, political pressure to report higher deportation numbers appears to have guided the Administration's immigration enforcement strategies, with internal agency communications released in February 2010 showing that DHS had explicit quotas to achieve 400,000 deportations within the fiscal year.[66]

Stronger immigration enforcement and the drive to obtain higher removal numbers has placed pressure on the already-strained governmental institutions needed to carry out these objectives. The immigration courts are notoriously under-resourced, and have not kept up with the rapidly expanding pace of immigration enforcement. The task of IJs has been compared to adjudicating death penalty cases in traffic court.[67] On average, four to six IJs share one judicial law clerk. The immigration courts regularly experience severe backlogs; in September 2011, nearly 300,000 cases were awaiting resolution before the immigration courts.[68] Despite rising

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[62] Immigration and Customs Enforcement, Press Release, *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security* (Oct. 19, 2011), available at http://www.ice.gov/news/releases/1110/111018washingtondc.htm.

[63] DHS, 2011 Yearbook at 94.

[64] See Chacon, *Diversion of Attention*, *supra* note 41 (describing range local-state-federal law enforcement partnerships aimed at immigration enforcement); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1149-68 (2008) (describing expanded interior enforcement efforts in immigration) [hereinafter Kalhan, *Interior Immigration Enforcement*].

[65] See Aarti Kohli, Peter Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

[66] Email from James Chaparro to DRO Taskings (Feb. 22, 2010) (stating that the agency's projections "only gives us a total of just over 310,000 overall removals -- *well* under the Agency's goal of 400,000"), available at http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf?sid=ST2010032700037.

[67] See Memorandum of Dana Leigh Marks, President of National Association of Immigration Judges, Immigration Court Needs: Priority Short List of the NAIJ (Oct. 2009), available at http://law.psu.edu/_file/NAIJ%20Priorities%20Short%20List%20-%20October%202009.pdf.

[68] Transactional Records Access Clearinghouse, *Immigration Court Backlog Rises for Another Year* (Dec. 8, 2011), available at http://trac.syr.edu/whatsnew/email.111208.html (reporting all-time high backlog of 297,551 cases pending in September 2011).

caseloads, IJs must adjudicate high-stakes cases against demanding case completion calendars that place pressure on judges to finish cases as quickly as possible.[69]

The problem of immigration court backlogs, coupled with the current system of immigration detention, means that noncitizens can regularly face prolonged periods of time in jail-like conditions while they wait to see an IJ who can adjudicate their case. Immigration detention has become a multi-million, if not multi-billion, industry for the private corporations who administer the majority of the nation's immigration detention facilities.[70] The average length in detention for immigrants who appear for IJ hearings is forty-one days,[71] but detention can last for months and even years depending on the case.[72]

Immigration enforcement and detention are not cheap, and costs for both have grown astronomically since the passage of the 1996 laws. In fiscal year 2012, ICE's requested budget was $5,822,576,000,[73] while Customs and Border Protection (CBP), which regulates the borders, had a requested budget of $11,845,678,000.[74] Together, the two agencies' budgets represented over $17 billion, and more than thirty percent of DHS's total requested $56 billion budget. Notably, an increase of $157.7 million was intended for ICE's Custody Operations to "support 33,400 detention beds" and the removal of "criminal aliens."[75] As a point of comparison, in 1998, the then-Immigration and Naturalization Service's budget was approximately $3.6 billion,[76] and in 1996 the federal government had 8,000 immigration detention beds.[77]

The lack of access to legal counsel for immigrants in removal proceedings, and for those in detention in particular, exacerbates the adjudication challenges noted above. Noncitizens in

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[69] *See* United States Government Accountability Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement* (2006) (stating that "EOIR evaluates the performance of the immigration courts baesd on the immigration courts' success in meeting case completion goals").

[70] *See* Detention Watch Network, *The Influence of the Private Prison Industry on Immigration Detention* (2008), available at http://www.detentionwatchnetwork.org/privateprisons (discussing difficulty of identifying precise percentage of profits resulting from ICE contracts generated for three corporations that collectively administer over 25,0000 detention beds on behalf of ICE).

[71] Department of Homeland Security, DRO-Custody Operations Program Performance Justification, U.S. Immigration and Customs Enforcement Salaries and Expenses, Congressional Justification FY 2011 at 49, available at http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf.

[72] *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 24, 49 (2010) (discussing prolonged immigration detention).

[73] Department of Homeland Sec'y, *Budget-in-Brief Fiscal Year 2012* at 75, available at http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf.

[74] *Id.*

[75] *Id*. at 10.

[76] *See* Chacon, *Diversion of Attention, supra* note 41, at 1571.

[77] U.S. Dep't of Justice, *FY 2002 Budget Summary* 114 (2001).

removal proceedings have no right to government-appointed counsel, and the majority of detained immigrants are *pro se*.[78] Many immigration detention facilities exist in remote locations that make it difficult for detained immigrants to obtain counsel.[79] Through the Legal Orientation Program (LOP), one out of ten immigration detention facilities host legal rights presentations conducted by non-profit organizations. However, even for the few facilities that offer LOP, participating organizations may not use LOP funds to offer actual legal representation. Studies have shown a strong correlation between having an attorney and success in the removal proceedings,[80] suggesting that a more robust right to counsel could increase the number of individuals who receive positive outcomes in their removal proceedings even higher as well as move cases more efficiently through the system.

Given that Immigration Court backlogs are preventing DHS from meeting its enforcement goals, it should come as no surprise that the federal government has looked to solutions that enable it to bypass the immigration courts. Nor should it be surprising, given the conditions described above, that many noncitizens decide not to fight their cases and instead choose to return home rather than face prolonged detention. In light of these pressures, one might think that stipulated orders of removal offer a suitable solution.

III. A Partial Solution? Understanding Stipulated Orders of Removal

What are the precise legal effects of stipulated removal order? Where does the legal authority for stipulated removal orders come from? This Part discusses the regulatory and statutory framework governing stipulated orders of removal, including their history and effect.

a. Statutory and Regulatory Authority: Waiving Rights in Removal Proceedings

The stipulated removal statute appears within section 240 of the Immigration and Nationality Act (INA), which addresses immigration court removal proceedings generally.[81] The

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[78] *See* Peter Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 541 (2009) (indicating that 58 percent of detained immigrants in removal proceedings did not have lawyers).

[79] *See* National Immigrant Justice Center, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* (2010), available at www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html.

[80] One study found that for non-detained immigrants, 74 percent who are represented have a successful outcome, in comparison to 13 percent who are not represented. Of detained immigrants, 13 percent have a successful outcome, in comparison to 3 percent who are not represented. *See* New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 358, 363 (2011) (finding that "the two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention").

[81] Although beyond the scope of the Article, other provisions within section 240 of the INA lend weight to a colorable argument that the stipulated removal regulations are *ultra vires* of the immigration statute because they authorize the entry of removal orders on unrepresented immigrants without an immigration court hearing. See 8 U.S.C. 1229a(a)(3) (stating that a "proceeding under this section shall be the *sole* and *exclusive* procedure for determining whether an alien may be admitted… [or] removed from the United States) (emphasis added).

statute does nothing more than instruct the Attorney General to "provide by regulation for the entry by an Immigration Judge an order of removal stipulated to by the alien (or the alien's representative) and [ICE]," and states that a "stipulated order shall constitute a conclusive determination of the alien's removability from the United States." The statute therefore delegates the bulk of the procedure to the Attorney General to develop consistent with the statute and Constitution.[82]

As described in greater detail by the federal regulation, the entry of a stipulated removal order both explicitly and implicitly eliminates the procedures and protections associated with immigration court hearings. A brief regulation consisting of less than 300 words sets forth the agency's vision of stipulated orders of removal and their legal effect. The regulation, at 8 C.F.R. section 1003.25(b), states as follows:

> An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. . . . A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States.

The regulation enumerates items that the written stipulation "shall" include, which highlight the main legal consequences of a stipulated removal order.[83] The noncitizen waives the right to any in-person hearing before an IJ, including the initial master calendar hearing or bond-related hearings.[84] The regulation sends mixed signals as to whether an IJ should, nonetheless, insist that an in-person hearing take place. On one hand, the written request signed by the noncitizen must state that the waiver of rights is "voluntary, knowing, and intelligent,"[85] and the judge "may enter" the removal order "without a hearing," suggesting that no hearing is necessary.[86] On the other hand, by stating that the IJ "must determine that the [unrepresented] alien's waiver is voluntary, knowing, and intelligent," the regulation contemplates that for *pro se* immigrants, an IJ should conduct an inquiry that goes beyond relying on the written document.

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[82] 8 U.S.C. § 1229a(d).

[83] *See generally* 8 C.F.R. § 1003.25(b).

[84] *Id.*

[85] 8 C.F.R. § 1003.25(b)(6) (requiring "[a] statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently").

[86] *Id.*

The request for a stipulated removal order admits the factual allegations raised by DHS,[87] concedes the legal grounds of removability,[88] and waives any rights to discretionary relief from deportation.[89] ICE is therefore relieved of the burden of proving removability. Thus, even if the immigrant could contest removability, seek discretionary relief, or otherwise remain in the country lawfully, signing a stipulated removal order waives the right to pursue each of these avenues. Although not stated explicitly in the regulation, a stipulated order also prevents the noncitizen from seeking release from detention on bond, even if he is eligible for a bond hearing, because a bond hearing must take place before an IJ.

An IJ reviews the written record, including the noncitizen's stipulated request, and issues the removal order itself.[90] As a result, a stipulated removal order carries the legal consequences of a fully-litigated removal order. These consequences include civil bars to lawful re-entry for anywhere from five to twenty years.[91] The noncitizen also becomes vulnerable to criminal prosecution under federal illegal re-entry statutes. While all noncitizens who cross the border without permission from the immigration agency may face criminal prosecution for misdemeanor illegal entry,[92] the sentence for illegal re-entry can be astronomically more severe, with jail terms reaching as high as twenty years.[93]

Finally, a stipulated removal order waives the noncitizen's rights to appeal the removal order to the BIA.[94] And because the immigrant must exhaust administrative remedies prior to filing a petition for review in the courts of appeal,[95] the stipulated order also arguably eliminates the right to judicial review.[96]

b. Regulatory and Statutory History: Allowing Stipulated Removal for *Pro Se* Noncitizens

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[87] 8 C.F.R. § 1003.25(b)(1) (requiring "[a]n admission that all factual allegations contained in the charging document are true and correct as written").

[88] 8 C.F.R. § 1003.25(b)(2)(requiring "[a] concession of deportability or inadmissibility as charged").

[89] 8 C.F.R. § 1003.25(b)(3) (requiring "[a] statement that the alien makes no application for relief under the Act").

[90] 8 C.F.R. § 1003.25(b)(7)(requiring "A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings").

[91] 8 U.S.C. § 1182(a)(9)(A).

[92] 8 U.S.C. § 1325.

[93] 8 U.S.C. § 1326(b)(2). For a discussion of the sentencing enhancement scheme that attaches to illegal re-entry cases, see Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719 (2010).

[94] 8 C.F.R. § 1003.25(b)(8) (requiring "[a] waiver of appeal of the written order of deportation or removal").

[95] 8 U.S.C. § 1252(b)(1).

[96] The stipulated removal regulation contains no provision waiving the immigrant's right to file a motion to reopen or a motion to reconsider before the IJ or BIA. *See* 8 C.F.R. § 1003.25(b).

The practice of allowing noncitizens to agree to their own removal orders appears to have begun in the early 1990s, in the absence of regulations or statutory authority and generally with noncitizens who had lawyers.[97] Prior to the enactment of the stipulated removal statute in 1996, the agency proposed two versions of a regulation governing stipulated removal. Despite the allure of greater efficiency offered by stipulated removal, including problems of overcrowding in immigration detention facilities and backlogs in the immigration courts,[98] both versions explicitly limited its use to noncitizens with counsel.[99] Even when stipulated orders of removal were contemplated for represented noncitizens only, due process concerns influenced the agency's internal deliberations. According to the agency, "numerous commentators' [] due process concerns" directly influenced the agency's decision to limit stipulated orders to represented immigrants and to give IJs discretion over whether to sign the orders, as opposed to making IJ approval of the orders mandatory.[100] To further safeguard the requirement that noncitizens understand the effect of the waivers, the agency also specified that the IJ must determine that any waiver was effected "voluntarily, knowingly and intelligently."[101]

In the mid-1990s, massive public concern over illegal immigration and foreign terrorism led to sweeping changes in the immigration laws.[102] The 1996 laws contained provisions aimed at streamlining "rules and procedures in the [INA] to make it easier to deny admission to admissible aliens and easier to remove deportable aliens from the United States,"[103] among other significant (and much-critiqued) changes to the statute.[104] For instance, the 1996 laws enacted

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[97] *See Executive Office for Immigration Review; Stipulated Requests for Deportation or Exclusion Orders Telephonic, Video Teleconferenced Hearings*, 59 Fed. Reg. 24,976, 24976 (May 13, 1994) (proposing regulations that would "codif[y] the litigation practice in some jurisdictions").

[98] *See Executive Office for Immigration Review; Stipulated Requests for Deportation or Exclusion Orders, Telephonic, Video Electronic Media Hearings*, 60 Fed. Reg. 26,351, 26,352 (May 17, 1995) (suggesting that wider use of stipulated removal "could alleviate overcrowded federal, state and local detention facilities and eliminate the need to calendar such uncontested cases on crowded immigration court dockets.")

[99] 59 Fed. Reg. at 24,976. The 1994 version of the regulation would have made the approval of a stipulated removal order mandatory for the immigration judge. *See id*. at 24976 (noting that "this practice currently occurs at the discretion of the Immigration Judge, [but] the proposed rule would make it mandatory"). In 1995, EOIR issued a rule that, in response to comments on the 1994 rule, retained the requirement that noncitizens have counsel but eliminated the provision making the IJ's signature on a stipulated order mandatory. 60 Fed. Reg. at 26,352.

[100] *Id*. at 26,351 (stating that final version of rule "modified to respond to the commentators' due process concerns," and noting specifically that IJ discretion "is limited to cases in which the applicant or respondent is represented at the time of the stipulation").

[101] *Id*. at 26,351-52.

[102] *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 1996 U.S.C.C.A.N. (110 Stat.) (3009-456).

[103] H.R. Rep. No. 104-469, pt.1, at 160 (1996).

[104] In addition to reconfiguring the procedures employed to deport noncitizens from the United States, IIRIRA and AEDPA also expanded the agency's detention authority, expanded the grounds for removal, contracted avenues for

"expedited removal" provisions that authorized border officials to summarily return individuals at the border, without a hearing, unless they claimed asylum and could convince a border official that they had a "credible fear" of returning to their home country,[105] a practice that immediately gave rise to human rights-based criticisms.[106] Another change affected noncitizens who re-entered the United States after having been previously removed. IIRIRA enacted reinstatement of removal provisions that required the immediate removal of such individuals, again without a hearing or any opportunity to seek relief.[107]

By contrast to the public criticism over expedited removal and other proposed changes aimed at streamlining the deportation process,[108] the stipulated removal provision received far less, indeed almost no, attention. The 1996 laws added the statutory provision authorizing stipulated removal.[109] However brief, the new statutory language authorizing stipulated removal radically changed the nature of the practice. By stating that the alien "or the alien's representative" could stipulate to a removal order, the statute opened the door to the possibility of unrepresented noncitizens receiving such orders. The stipulated removal statute passed with no explicit legislative debate.

In the aftermath of the 1996 immigration laws and the enactment of the stipulated removal statute, in January 1997, EOIR and then-INS's proposed regulation completely eliminated the requirement that stipulated orders be limited to represented noncitizens.[110] The 73-page Federal Register announcement also sought to implement "pervasive" changes to many aspects of the immigration laws enacted by Congress, including the procedures governing expedited removal, removal procedures, asylum claims, apprehension and detention, which the Federal Register described as "[broad] and complex[]."[111] Given the length of the overall proposed regulation, stipulated orders of removal received no explanatory discussion. The Federal Register simply contained the revised regulation, which authorized stipulated removal's use on *pro se* immigrants.

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discretionary relief, and eliminated several avenues for the federal courts to exercise judicial review over agency decisions. *See also* Kanstroom, *supra* note 46; Morawetz, *supra* note 46.

[105] Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 221-24 (1999) (describing expedited removal); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L. L. 117, 134-41 (2001) (arguing that expedited removal provisions violate international human rights laws).

[106] See *id.*

[107] *See* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8(a).

[108] *See supra* note 105.

[109] *See supra* text accompanying notes 81-82.

[110] *See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 444 (Jan. 3, 1997).

[111] *Id.* at 444 (noting that the "length of this rulemaking document alone … demonstrates the breadth and complexity of these changes").

Just two months later,[112] the agency's interim regulations – which remain in force today—retained the provision permitting the entry of stipulated orders on unrepresented noncitizens. The regulations acknowledged the due process concerns raised during the notice-and-comment period, [113] but did not change the regulation.[114] Instead, the agency pointed to the "requirement that the [IJ] determine if an unrepresented alien's waiver is voluntary, knowing and intelligent," explaining that the requirement would "safeguard[] against an imprudent waiver of a formal adjudication on the part of an unrepresented alien."[115] The agency went on to acknowledge the possibility of an IJ holding a hearing on a stipulated removal request, stating that "[i]f an Immigration Judge is confronted with a stipulated request raising due process concerns, he or she may examine that request in the context of a hearing."[116]

Thus, in the midst of extensive changes to the immigration laws, and to removal procedures in particular, Congress and the executive branch quickly and quietly transformed stipulated orders of removal. The process started as a mechanism that was available for the small percentage of represented noncitizens who, with the benefit of counsel, determined that they were ineligible for immigration relief. In the aftermath of the 1996 laws, stipulated removal became a program that ICE could, and did, potentially utilize on the vast numbers of noncitizens facing removal without access to accurate legal information.

IV. Stipulated Removal in Practice

This Part provides the first descriptive account in legal scholarship of how the stipulated removal program has operated in recent years, and draws largely from internal agency records and data made available through the Freedom of Information Act (FOIA).[117] Despite its existence in the statute and regulations for the past fifteen years, very little has been known about stipulated orders of removal.[118] Several factors have contributed to stipulated removal's almost secretive status. First, the vast majority of stipulated removal orders take place in immigration

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[112] The agencies had been directed by Congress to publish implementing regulations by March 1, 1997, just five months after the enactment of IIRIRA and AEDPA on September 30, 1996. As a result, the public was given only 30 days for comments, rather than the usual 60 days. *Id.*

[113] *Id.* at 10,322 (describing concern of commentator that proposed regulation failed to provide "adequate safeguard[s]" against potential for due process violations).

[114] *See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312 (Mar. 6, 1997).

[115] *Id.*

[116] *Id.*

[117] *See Nat'l Lawyers Guild San Francisco et al. v. Dep't of Homeland Sec'y et al.,* No. C 08-5137 RS (N.D. Cal. filed Nov. 12, 2008).

[118] Jayashri Srikantiah and Karen Tumlin, *Backgrounder: Stipulated Removals* at 1 (2008), available at http://www.law.stanford.edu/program/clinics/immigrantsrights/pressrelease/Stipulated_removal_backgrounder.pdf ("Despite the rapid expansion of stipulated removal, little is known about when and how these orders are used by immigration officials.").

detention facilities, which have been criticized for imposing systematic barriers on detainees' communication with the outside world through a regime that involves remote locations, frequent transfers of detainees, and hurdles to obtaining legal information and representation.[119] Second, even though complaints about the lack of transparency in immigration law are not new,[120] the agency has released surprisingly little information about stipulated removal to the public.[121] Third, a combination of law and practice has made it difficult for those who have signed stipulated orders to later challenge them. Because stipulated removal disproportionately affects *pro se* immigrants who are often deported within days, immigration attorneys have limited exposure to individuals who agree to stipulated orders. The speed of the process means that individuals who might have claims to challenge stipulated orders have little time to hire an attorney to challenge the order. Once deported, the agency's rule that immigrants could not file a motion to reopen a removal order once physically removed—known as the post-departure bar (which several courts of appeal have recently invalidated)—likely prevented recipients of stipulated removal orders outside the U.S. from filing legal claims.[122] As a result, the federal courts and BIA have had limited opportunities to fully examine the implications of the agency's use of stipulated orders of removal, while stipulated removal has remained far from the public eye.

In the past two to three years, immigration advocates, the federal courts, and the immigration agencies have begun to shed light on how the executive branch has implemented stipulated orders of removal. The program's relatively brief history, and what little information exists, suggests that stipulated removal has rapidly expanded throughout immigration detention centers for use primarily on unrepresented detainees. In the vast majority of cases, IJs signed stipulated removal orders without holding in-person hearings to independently verify that the immigrant understood the consequences of signing the order. Given the lack of access to counsel and the absence of procedural protections for detainees during the process, the program has a high potential for abuse and for implicating the procedural due process principles that apply to removal proceedings.

a. Expansion at National and Local Levels

A dramatic growth in the entry of stipulated orders took place in the mid- to late-2000s. According to data from the Executive Office for Immigration Review (EOIR), at least 160,000 stipulated removal orders were entered through May 2010, with a steady increase in numbers

[119] *See* Anil Kalhan, *Immigration Detention*, *supra* note 72; Nat'l. Immigrant Justice Center, *supra* note 79.

[120] *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, __ NEW HAMPSHIRE L. REV. __ (manuscript forthcoming 2012)

[121] For instance, neither the DHS Statistical Yearbook nor the EOIR Statistical Yearbook contain any reporting on stipulated orders of removal.

[122] 8 C.F.R. § 1003.23(b)(1). A number of circuit courts of appeal have invalidated the post-departure bar as an invalid exercise of agency discretion. *See Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, No. 10-9500, -- F.3d --, 2012 U.S. App. LEXIS 1964 3 (10th Cir. Jan. 30, 2012) (en banc).

from 2004 to 2008 in particular.[123] The then-INS first encouraged the expansion of the stipulated removal program in the late 1990s, shortly after the regulatory revision that enabled their use on pro se immigrants.[124] Internal agency memoranda demonstrate that the immigration agency sought to aggressively use stipulated removal alongside other streamlined removal procedures to decrease the overall number of noncitizens who would appear before the immigration courts.[125] However, from 1997 to 2004, stipulated removal was rarely used. The factors preventing greater use of stipulated removal orders during the late 1990s and early 2000s are unclear. It may be that the 1996 laws introduced such massive changes to immigration law enforcement that stipulated orders were overshadowed by other enforcement priorities, especially the expansion of criminal grounds of removal, litigation over the retroactive application of the 1996 laws and elimination of the right to habeas corpus review, and changes in removal procedure.

In 2004, the immigration agency again shifted its attention to stipulated orders of removal. Internal agency memoranda directed officers to maximize the use of stipulated removal in connection with efforts to enhance efficiency in the removal process.[126] In recognition of the

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[123] *Id.* Deportation Without Due Process contained data on the number of stipulated removal orders entered through May 2010. Since then, a draft report issued by the Administraive Conference of the United States reported that 27,607 stipulated removal orders were entered in fiscal year 2010. Lenni B. Benson and Russell Wheeler, *Interim Draft: Enhancing Quality and Timeliness in Immigration Removal Adjudication* 126 (Feb. 17, 2012), available at http://www.acus.gov/wp-content/uploads/downloads/2012/02/ACUS-Immigration-Removal-Adjudication-Draft-Report-2_17_12.pdf. Data for 2011 or 2012 are not publicly available, but it would be reasonable to estimate that anywhere between 25,000 and 35,000 stipulated orders were entered in 2011.

[124] *See, e.g.*, Memorandum from Mark Reed, ICE regional director, to Central Region District Directors and Chief Patrol Agents, re: Administrative, Stipulated, and Reinstated Removals (June 4, 1998) ("mandating" the use of administrative, stipulated, and reinstated removals "as early as possible in the investigative or arrest stages" and noting it "imperative all Districts and Sectors ensure the maximum possible use of these procedures") (on file with author); Memorandum from Dwayne E. Peterson, ICE Acting Regional Director, to Central Region District Directors and Chief Patrol Agents, re: Alternative Removal Proceedings (Aug. 28, 1997) (ICE.08-1450.00003) (stating that "notice to appear before an immigration judge should only be served after clearly determining that the alien is ineligible for alternative removal proceedings," including stipulated removal) (on file with author); Memorandum from Thomas C. Leupp, Eastern Regional Director, EOIR, to Eastern Region District Directors and Chief Patrol Agents, re: Stipulated Removal Changes Under IIRIRA (July 24, 1997) (EOIR-2008-5140(7)-0000451) ("strongly recommend[ing] . . . implementing an aggressive program in your location" to use stipulated removal on all noncitizens for whom reinstatement or administrative removal are inappropriate) (on file with author); Memorandum from Brian R. Perryman, Executive Associate Commissioner, Headquarters Office of Field Operations, ICE, to Regional and District Directors, Chief Patrol Agents, and Service Center Directors, re: Alternative Removal Proceedings (July 31, 1997) (ICE.08-1450(13).000258) (encouraging use of alternatives to immigration court proceedings, including stipulated removal) (on file with author).

[125] *See id.*

[126] *See, e.g.*, Memorandum from Antony Tangeman, DRO Director, to Leonard Kovensky, Deputy Assistant Director of Field Operations Division and Field Office Directors, re: UPDATED Guidance for use of stipulated removals, (Jan. 12, 2004) (ICE.08-1450.000006) (requiring all field office directors to coordinate with Office of Chief Counsel (OCC) and local court to develop procedures for stipulated removal orders) [hereinafter 2004 Tangeman Memo] (on file with author); Memorandum from Asa Hutchinson, Under Secretary for Border and Transportation Security, DHS, to Robert Bonner, Commission of Customs and Border Protection and Michael J. Garcia, Assistant Secretary of ICE, re: Detention Prioritization and Notice to Appear Documentary Requirements (Oct. 18, 2004) (ICE.08-1450(3)-000157) (noting that "[e]ach component must ensure apprehended aliens are processed efficiently and placed in the appropriate and most expedient removal process," including stipulated removal) (one file with author); Memorandum from Mary Forman, Director of ICE Office of Investigations and

fact that the immigration courts and enforcement agency are divided into a series of local courts and field offices,[127] the agency encouraged its regional and local offices to create protocols for the implementation of stipulated removal.[128] In 2007, the director of ICE's detention and removal office explicitly linked the use of stipulated removal to the agency's need to efficiently manage its detention bed space, and instructed all directors of local ICE field offices to "expand the use of stipulated orders of removal."[129] The agency's renewed focus on stipulated removal in the mid-2000s appears connected to the Bush Administration's immigration enforcement strategy, which involved increasing the overall number of formal removals, greater use of immigration detention, and stronger immigration enforcement in the interior parts of the country.[130] For example, one internal memo to all field office directors of ICE emphasized ICE's "goal [] to improve removal operational efficiency by at least 10% from the prior fiscal year, which would result in approximately 207,000 removals during the 2007 fiscal year."[131] Immigration enforcement goals thus gave rise to a heightened need to efficiently manage the removal process while obtaining successively higher removal numbers each year.

Implementation of stipulated removal in the mid-2000s, when stipulated removal expanded, took place primarily through local ICE field offices and immigration courts developing their own protocols to incentivize the entry of such orders. For at least some ICE field offices, the ability to report higher numbers of official removal orders, and the creation of stipulated removal quotas for individual offices, appears to have motivated the use of stipulated removal.[132] For instance, an ICE official in Atlanta, Georgia indicated in an internal email that stipulated removal orders should be used even if voluntary departure is available because the latter "do[es] not count for statistics and[,] let's face it[,] I would prefer a bigger BANG for our

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Victor Cerda, Acting Director of DRO to All Special Agents in Charge and All Field Office Directors, re: ICE Transportation, Detention and Processing Requirements (Jan. 11, 2005) (ICE.08-1450(3)-000155) (referencing above Hutchinson memo and reiterating emphasis on use of stipulated and other alternative removal forms) (on file with author).

[127] *See* Immigration and Customs Enforcement, Enforcement and Removal Operations, at http://www.ice.gov/contact/ero/ (listing field offices); EOIR Immigration Court Listing, at http://www.justice.gov/eoir/sibpages/ICadr.htm (listing immigration courts).

[128] *See* 2004 Tangeman Memo, supra note 126.

[129] Memorandum from John P. Torres, DRO Director, to Field Office Directors, re: Bed Space Management (Aug. 1, 2007) (ICE-08-1450(4)-000031) (instructing that "each of you must . . . [e]xpand the use of Stipulated Orders of Removal," and noting the "end[of] the practice of 'catch and release'" along the southern border in 2005, and anticipated increases to detention bed space in upcoming fiscal year) (on file with author).

[130] *See* Kalhan, *Interior Immigration Enforcement, supra* note 64; Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1832, 1850 (2011) (discussing use of worksite raids under second term of Bush Administration and effect of 287(g) program on subfederal law enforcement's role in immigration enforcement)

[131] Memorandum from John P. Torres, DRO Director, to Field Office Directors and Deputy Field Office Directors, re: Recommendations to Improve Removal Processes (Feb. 22, 2007) (ICE.08-1450.000007) (on file with author).

[132] Email from redacted sender to redacted recipients, re: Stipilated [*sic*] Removals July 2006 (Aug. 1, 2006) (ICE.08-1450(11).000456) (celebrating reaching goal of 100 stipulated removal orders a month, and suggesting that office reach 200 a month) (on file with author) [hereinafter Aug. 1, 2006 email from redacted sender].

tax dollars that we will invest during this operation."[133] Other incentives, such as monthly quotas[134] or better evaluations of local field offices by the agency's headquarters,[135] contributed to its growth.

Immigration Judges' high caseloads and case completion goals have provided an incentive for them to sign stipulated removal orders without holding hearings. A case with a stipulated removal order can be "closed" far more quickly, with a single signature, than one in which the noncitizen has multiple hearings, files motions, and provides testimony.[136] Indeed, one court administrator stated that "it would be devastating" to stop doing stipulated removals, because the court "has only been able to get by on its detained docket and stay true to case completion goals because we do so many [stipulated removals,] which don't clog up the dockets."[137]

Stipulated removal orders in recent years have accounted for anywhere between ten and thirty percent of all removal orders issued by the federal government, depending on which agency is reporting the numbers. According to internal EOIR data, between 2007 to 2009, on average, approximately 30,000 stipulated orders of removal were entered each year[138]--statistics that are consistent with the little public reporting of stipulated removals from ICE's Office of

[133] Email from redacted sender to T. Bird re: 30-50 Stipulated NTAs to file Thursday (Apr. 13, 1999) (ICE-08-1450(3)-000142) (responding to Bird's comment that for Mexican nationals without criminal convictions, "[i]f these aliens are not criminals and re just from Mexico then you may want to consider just giving them V.R. [voluntary return]") (on file with author).

[134] *See* Aug. 1, 2006 email from redacted sender, *supra* note 132; Email from R. Mateo, ICE Deputy Chief Counsel, to T. Scala and S. Siegel, re: BTC Stipulations (Apr. 2, 2007) (ICE-1450(9).000642) (asking for further clarification on numbers of stipulated removal orders obtained by each individual recipient, and noting that the writer wants to "get you guys additional recognition") (on file with author); Email from redacted sender to redacted recipient (Jan. 17, 2007) (ICE-08-1450(5)-000298) (stating that field office director "would like for us to offer Stipulated Removals for all those cases currently being offered VRs [voluntary returns] and directing agents to "establish a weekly count" of stipulated removals) (on file with author); Email from redacted sender to T. Aitken and N. Alcantar, San Francisco DRO, re: Total Stips for Dec 2007 (Feb. 8, 2008) (ICE.08-1450(11).000597) (suggesting the creation of an "award specifically for stip cases") (on file with author). The author of this email also suggested that "[t]he easiest way may be to set goals, something like 25% of NTAs should be stipped and maybe provide training," and noted that "[a]ll you need is one hard charging IEA to kick out a bunch of stips to show it can be done." *Id*.

[135] *See* Email from F. Venegas, Deputy Field Office Director, ICE, to E. Gastelo, Acting DCC, ELP-OCC, re: Stipulated Removals (Aug. 6, 2008) (ICE-08-1450(7).00002) (noting that field office director "rated on" ability to reduce "average length of aliens in our custody," and therefore encouraging use of stipulated removals) (on file with author).

[136] *See* Email from M. Jauregui, Court Administrator, San Francisco Immigration Court, to an immigration judge, re: Stipulated Removal Program (Oct. 23. 2007) (EOIR-2008-5140(5)-000061) (asking if the IJ would participate in signing stips and stating: "If you are, please note that these cases will count as completions for the month, but as previously mentioned must be reviewed and signed off on the same day.") (on file with author).

[137] *See* Email from S. McDaniel, to S. Griswold and S. Rosen, re: Stips (Apr. 25, 2008) (EOIR-2008-5140(5)-000039-42) (noting that a San Francisco court was able to meet "case completion goals" due to large number of stipulated removals in jurisdiction).

[138] *See* Koh et al., *supra* note 32.

Chief Counsel.[139] However, many removal orders are not assigned to either ICE counsel or an IJ at all. These orders, which include reinstatements, expedited removal, or administrative removal, are executed and issued by DHS through front-line immigration agents. As a result, the total numbers of removal orders that ICE's Office of Chief Counsel accounts for, as well as the number of removal orders actually issued by an IJ, are much smaller than the total number of removal orders reported by DHS. For instance, in fiscal year 2008, ICE reported its *attorneys* as having "obtained" 91,374 final orders of removal,[140] EOIR reported 156,056 removal orders issued by IJs,[141] while by comparison DHS issued the far greater number of 359,795 removals.[142] Thus, for the most recent year in which complete data is available, stipulated removals constituted nearly *one-third* of all final removal orders obtained by ICE attorneys, nearly *one-fifth* of all removal orders issued by Immigration Judges, and almost *one-tenth* of all removals issued by DHS.[143] Despite the relatively high proportion of stipulated removal orders, EOIR has never publicly reported on – or even referenced – stipulated orders in its annual yearbook of statistics. Notwithstanding the variations in public reporting, this preliminary analysis shows that stipulated removals have comprised a substantial percentage of all removal orders entered each year, particularly in comparison to the scant attention they have received.

b. The Face of Stipulated Removal: *Pro Se* Immigrant Detainees

Who has stipulated removal affected most? Most immigrants who received stipulated orders were in immigration detention, did not have lawyers (96 percent), faced non-criminal grounds of removal (80 percent), and were from Mexico or Latin American countries (98 percent).[144] Thus, unrepresented immigrant detainees from Spanish-speaking countries who

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[139] In fiscal year 2008, ICE noted that just over 30,000 – or almost thirty percent of all final removal orders "obtained" by ICE attorneys – were stipulated orders. *See* Immigraiton and Customs Enforcement, Dep't Homeland Sec'y, *ICE Fiscal Year 2008 Annual Report: Protecting National Security and Upholding Public Safety* 28 (2009), available at www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf ("In FY08, ICE attorneys obtained 91,374 final orders of removal; [*sic*] which included 30,707 stipulated orders of removal . . . .") [hereinafter *ICE Fiscal Year 2008 Report*]. For fiscal year 2009, ICE disclosed obtaining nearly 30,000 stipulated removal orders. Dept't of Homeland Sec'y, *Immigration and Customs Enforcement: Salaries and Expenses: Fiscal Year 2011: Overview: Congressional Justification* 18 (20110 (U.S. Dept. of Homeland Security, undated), available at www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf (stating that "[a] total of 29,012 cases were completed through the stipulated removal process.").

[140] *See ICE Fiscal Year 2008 Report* at 28.

[141] EOIR reported 182,720 total "removals" for fiscal year 2008. EOIR, *FY 2010 Yearbook* at D2. However, EOIR also stated that the total number of "removals" *includes* voluntary departure, which that year numbered 26,684. *Id.* at Q1, D2 ("Orders of voluntary departure are included as removals."). Because voluntary departure is technically a form of immigration relief, a more accurate number of removal orders issued by EOIR for FY 2008 should not account for voluntary departure, thus bringing the total number of removal orders issued by EOIR to 156,036.

[142] DHS, *FY 2011 Yearbook* at 94 (defining removals as orders that lead to "administrative and criminal consequences placed on subsequent re-entry")

[143] The ICE Office of Chief Counsel has not made stipulated removal order numbers available after fiscal year 2008.

[144] *See* Koh et al., *supra* note 32 (analyzing data received from EOIR). That 98 percent of stipulated removal recipients came from Mexico or Latin American countries reinforces the longstanding link between immigration policy and race. *See* Keith Aoki and Kevin Johnson, *Latinos and the Law: Cases and Materials: The Need for*

have not been convicted of a removable offense are the overwhelming face of stipulated removal.

The specific selection criteria, as well as the frequency, timing, and extent of the use of stipulated removal orders appear to depend on the discretion of agency officials at the local level. At the Eloy, Arizona detention facility, for instance, ICE agents have been instructed to use stipulated removal on immigrant detainees who are Mexican citizens, in the United States for less than ten years, and charged with unlawful entry to the United States.[145] In other jurisdictions, ICE has used stipulated removal on noncitizens charged with unlawful entry – but not, say, crime-based grounds of removal–without regard to their length of residence.[146] Neither the stipulated removal statute, regulations, nor any internal agency guidance bar its use on juveniles, the mentally ill, or lawful permanent residents.[147]

c. Roles of Institutional Players and *De Facto* Stipulated Removal "Procedure"

The statute and regulations contain only minimal guidance as to stipulated removal procedures. Three phases constitute the *de facto* process that has developed: (1) a "solicitation phase," in which ICE agents describe stipulated removal orders to immigrants and solicit their signatures on the stipulated removal requests; (2) review and concurrence by ICE attorneys; and (3) review and signature by Immigration Judges. At no point during the process do immigrants, the vast majority of whom are in detention, consult with an attorney or receive a neutral explanation of the process from a disinterested government official.

1. Role of ICE Agents: Solicitation Phase

Focus in Critical Analysis, 12 HARV. LATINO L. REV. 73, 92 (2009) (linking modern immigration enforcement to ongoing conversations in "LatCrit," such as the concept of "discrimination by proxy").

[145] United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010). The prohibition on using stipulated removal on noncitizens who have lived in the country for over ten years appears aimed at preventing its use on immigrants who are potentially eligible for one form of relief from removal known as "cancellation of removal." *See* 8 U.S.C. § 1229b(b) (requiring, *inter alia*, ten years' physical presence to apply for cancellation of removal for certain nonpermanent residents).

[146] *See* Stipulated Final Orders of Removal, Standard Operating Procedures (San Antonio) (ICE-08-1450(4)-000148) ("At this moment, we are only processing all EWI and overstays without convictions alleged in the NTA") (on file with author); Memorandum from B. Perkins to All NTA-Issuing Posts, Department of Homeland Security, San Diego (EOIR-2008-5140(6)-000582) ("There must be only one charge on the NTA and that is under section 212(a)(6)(A)(I) of the [INA], present without inspection or parole") (on file with author).

[147] Internal government documents suggest that stipulated orders of removal may have been used on juveniles, the mentally ill, and the physically disabled. *See* Chief Counsel Offices Responses: Stipulated Removal Process (Feb. 10, 2006) (ICE.08-1450(13).000230) (noting that an immigration judge in Houston/Huntsville area "agreed to expand to juvenile program," and referencing note from Baltimore Chief Counsel indicating that "[w]e do use Stipulated Removal in cases of aliens who have been found not criminally responsible and who are detained at a state mental institution.") [hereinafter Chief Counsel Responses] (on file with author); Email from redacted sender to redacted recipients, re: stipulated removal form for admin. closed case (Aug, 10, 2005) (ICE.06-23467-000512-13) (referencing use of stipulated removal in case involving "paraplegic with bed sore problems") (on file with author).

Typically, during the solicitation process, ICE officials approach immigrant detainees either in groups or individually to describe the stipulated removal process and solicit participation. ICE agents do not screen detainees' cases to determine, for instance, if they might be eligible to apply for release from detention on bond or apply for relief from removal. Since most recipients of stipulated removal do not have lawyers or access to legal information, ICE agents are usually the immigrant's sole source of information about their options and the law. No legal authority regulates the conduct of ICE agents who approach immigrant detainees about stipulated orders of removal. The practical potential for language barriers and coercion to pervade the solicitation phase was articulated in one email from an agency official:

> The [stipulated removal] program is allowed by regulation, but it is implemented by personal relationships. The reality is that we are asking the [Immigration Judge and the ICE attorney] to rely on a non-attorney to accurately discharge the legal requirements and also to be honest – after all it would be really easy to trick an illiterate non-English speaker into signing a request for a stip order.[148]

In the absence of any restraints on how ICE officers explain stipulated removal to detainees, it is not surprising that informal explanations that reflect the interests of the immigration agency have developed to fill the void. Internal government scripts that ICE agents have apparently used in at least some jurisdictions suggest that immigrants systematically have received given inaccurate and misleading information about their rights, and that ICE agents use the threat of longer detention in order to convince detainees to waive their rights through a stipulated removal order.[149] For instance, one unofficial government script contains obvious misstatements about detainees' legal options, and omissions regarding the civil and criminal consequences associated with signing a stipulated order of removal.[150] Despite the fact that eligibility for immigration relief often involves a complex analysis of multiple legal and factual questions (including, but not at all limited to, whether they were the victim of a crime[151] or fear persecution in their home country[152]), the script states that the "only" way for detainees to "fix [their] papers" is through certain family relationships.[153] It then goes on to incorrectly list forms of immigration status that can be obtained through family relationships.[154] Although many noncitizens who are initially detained are eligible for bond, the script provides false information

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[148] Chief Counsel Responses, *supra* note 147 (describing stipulated removal program in Memphis, TN).

[149] Stips Presentation (Spanish) (ICE-08-1450(6)-000066) (emphasizing that it may take "a month" to see a judge for the first time, but that a stipulated removal order "eliminates/cuts the time in half," and that presenting one's entire case to the judge could take between "six months and three years") (on file with author) [hereinafter Stips Presentation (Spanish)].

[150] *Id.*

[151] *See* 8 U.S.C. § 1101(a)(15)(U)(providing nonimmigrant status to certain victims of criminal activity).

[152] *See* 8 U.S.C. § 1158 (political asylum statute).

[153] Stips Presentation (Spanish), *supra* note 149.

[154] *See id.* (stating that brother and sisters of "residents" can qualify for relief). In fact, lawful permanent residents have no right to petition for their siblings' immigration status..

about their rights to seek bond and discourages them from even asking for bond. For instance, the script states that a person with "any charge related to drugs, any charge…related to hitting another person like assault or battery, [or] any charge that is a felony resulting in a sentence of 180 days or more," will be "automatically disqualified" from receiving bond, and that "it is most probable that you will be denied"[155] – even though the immigration laws contain no such bar on the ability to obtain bond under such circumstances. Furthermore, the script neglects to explain the alternative of voluntary departure, which would allow a noncitizen to leave the country, reduce their time in detention, and avoid the civil and criminal penalties that potentially accompany receiving a formal order of removal.[156]

Poor translation appears to have distorted ICE agents' conversations with noncitizens during the solicitation stage. The script discussed above, for instance, is written in broken Spanish, replete with confusing and condescending language that exacerbates the error in the script itself.[157] As highlighted in the Introduction, an ICE agent in Eloy, Arizona regularly asked, in "nonsensical" and "unintelligible" Spanish, a question she understood to mean, 'do you want to fight your case or want to sign?'"[158] Some IJs have seen the language problems inherent in relying on ICE protocols. As one judge stated, "having seen [ICE officers's Spanish language] proficiency up close[,] I'm not sure their Spanish is sufficient to communicate to the degree necessary for stipulated removal."[159] Against this context, at the end of the solicitation process an immigrant detainee may sign a pre-printed form that states that the waiver of rights was knowing, voluntary and intelligent.[160]

Reports of immigration advocates around the country have confirmed that ICE agents who present stipulated orders of removal have left a number of detainees confused about their legal options, and feeling pressured to accept stipulated orders of removal.[161] ICE agents have reportedly told detainees who are actually eligible for relief that their only viable option is to accept a stipulated order, sometimes in a language that is unintelligible to them. Certainly, agreeing to a stipulated removal order may represent the best option for some immigrants, particularly if they are not eligible for any immigration relief including voluntary departure. However, the legal framework places few constraints on ICE agents' actions despite the fact that detainees remain heavily reliant on those agents.

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[155] *Id.*

[156] *See supra* discussion accompanying note 54.

[157] *See* Koh et al., *supra* note 32 & n.43 (reprinting original Spanish).

[158] United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010)

[159] Email from A. Reese to L. Dean re: Stips (Aug. 1, 2008) (EOIR-2008-5140(4).000058) (on file with author).

[160] *See* 8 C.F.R. § 1003.25(b)(6) (requiring that request for stipulated removal order contain "[a] statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently").

[161] *See, e.g.*, Paloma Esquivel, *Many Deportees Unwittingly Wave Rights, Report Says*, LOS ANGELES TIMES (Sept. 9, 2011) (referring to statement of Karen Tumlin, managing attorney at National Immigration Law Center, describing over a dozen interviews with immigrant detainees at Mira Loma Detention Center in Lancaster, CA, who signed stipulated orders of removal and "had absolutely no idea what the legal consequences were").

2. Role of ICE Attorneys: Representing the Government's Interests

Should the noncitizen sign the request for the stipulated removal order, the documentation must be reviewed and signed first by an ICE attorney, and then by an IJ, in order to become final.[162] Like the solicitation phase, the statute and regulations provide no guidance regarding this review process. ICE attorneys who sign stipulated removal requests on behalf of ICE have no legal obligation to review the noncitizen's records for eligibility for relief, nor do they review the requests for evidence that the noncitizen's waiver of rights was valid or for eligibility for relief.[163] Indeed, ICE attorneys typically have no direct contact with noncitizens during the stipulated order of removal process. It appears, based on initial evidence of the program, that ICE attorneys act primarily to rubber-stamp agents' requests for stipulated orders.[164]

3. Role of Immigration Judges: Rubber-stamps or Dissenting Voices

In the vast majority of cases, the bulk of the paperwork related to a stipulated order of removal occurs prior to the noncitizen's first court appearance, known as the master calendar hearing. Once the noncitizen and a DHS attorney sign the request, the stipulated order request then proceeds to an IJ for final review and issuance of the removal order. In accordance with the regulation, the IJ must determine the validity of the noncitizen's waiver.[165] In the absence of a hearing, the IJ relies entirely on the boilerplate form signed by the detainee that states, pursuant to the regulation, that the waiver was voluntary, knowing and intelligent.[166] IJs have responded to the rise in stipulated orders of removal in drastically different ways. Not surprisingly, stipulated removal is implemented in a disparate manner across the country, with some

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[162] *See* 8 C.F.R. 1003.25(b).

[163] *See* email from P. Nishie to P. Spaletta, E. Lopez, C. Cutler, J. Castro, M. Curry and S. Nohara re: Stip (Aug. 23, 2007) (stating that "OCC [Office of Chief Counsel] will not reject stips on the grounds that an alien may be eligible for relief"). EOIR's recent revision of the stipulated removal forms require an ICE attorney to sign a statement indicating that the noncitizen has not already applied to the agency for a few specified forms of relief, a level of review that does not involve identifying potential forms of relief for the noncitizen. *See* Stipulated Removal OPPM, *supra* note 30 (requiring ICE attorney to sign statement indicating that review of alien registration file "do[es] not reflect" that noncitizen has filed a claim to U.S. citizenship, an application for legalization under sections 210 or 245A of the INA, or has an approved visa petition that is pending with the agency).

[164] In at least one jurisdiction, ICE attorneys were encouraged to spend no more than seven or eight minutes on the review process. *See, e.g.*, Email from J. Stolley to R. LeFevre, L. Rosenberg, and L. Ungerman, re: Review of Stipulated Removals (Nov. 8, 2006) (ICE.08-1450(11).000481) (stating that "fifteen minutes is way too long" a period of time for a DHS trial attorney to review a stipulated removal order for legal sufficiency and instructing recipient to "[c]ut that in half") (on file with author).

[165] 8 C.F.R. § 1003.25(b).

[166] *Id.*

jurisdictions using stipulated orders of removal in nearly fifty percent of all completed matters, and others using stipulated orders less than one percent of the time, if at all.[167]

Some judges, concerned with the potential for abuse in the program, have generally refused to rubber-stamp stipulated orders without holding in-person hearings in order to confirm the validity of the immigrant's waiver.[168] For example, one IJ stated in an email that he "has determined that the waiver is not knowing in almost all occasions," in large part because "in unrepresented cases, … the alien is told that if he wants [to] get out of jail he should sign this paper."[169] Other IJs have echoed similar concerns, noting that noncitizens are told that ICE agents "just told them to sign,"[170] or had identified cases where noncitizens were statutorily eligible for relief from removal.[171] The attitude held by these IJs appears to reflect a perception that IJs have a duty to conduct a minimal level of due diligence into the cases that form the basis for a removal order.

In most jurisdictions, IJs' reluctance to sign stipulated orders in the absence of hearings has led ICE to view these IJs as barriers to the implementation of stipulated removals. ICE officials have made abundantly clear that they view the absence of in-person hearings as a fundamental characteristic of the stipulated removal program, and that to hold hearings would invalidate the very purpose of the practice.[172] The relationship between IJs' willingness to sign stipulated removal orders without holding a colloquy with the noncitizen and the "success" of the stipulated removal program in particular jurisdictions has been a subject of regular discussion in inter- and intra-agency communications and meetings.[173]

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[167] *See* Benson & Wheeler, *supra* note 123, at 126 (showing stipulated removals as approximately fifty percent of completed proceedings in fiscal years 2009 and 2010 in Salt Lake City, and zero percent in locations including San Antonio, Boston, and Miami).

[168] *See, e.g.*, Email from C. Shanahan, ICE Field Office Director, New York, to M. Flores, re: Stipulated Removals (Feb. 28, 2008) (ICE-08-1450(6).000134-36) (indicating that chief immigration judge and court administration in New York City "stated clearly that they will not sign off on Stipulated Removal Orders without having the detainee brought to court") (on file with author); Email from J. Grable, to D. Cassidy (Jan. 23, 2007) (ICE-08-1450(9).273) (explaining that immigration judges in San Juan and Buffalo require court appearances for unrepresented aliens) (on file with author)

[169] Email from A. Greer to EOIR Officials, re: Another Inquiry About Stipulated Removal Orders (June 15, 2006) (EOIR-2008-5140(8)-000084-87) (on file with author).

[170] Email from J. Vandello to A. Vomacka re: Stipulated orders (Jan. 26, 2007) (on file with author).

[171] Email from redacted sender to redacted recipient, re: STIPS (Dec. 14, 2004) (discussing cases where immigration judge found noncitizen eligible for relief from removal but had signed request for stipulated removal order) (on file with author); Email from M. Ramos, to V. Reyes-Lopez, C. Guilloty-Dorsey, J. Ramos, re: Stipulated Removals San Juan due date Feb 14 (Feb. 13, 2007) (ICE.08-1450(10).000648-49) (noting than an IJ rejected stipulated removal orders because the "alien could possibly have a relief from removal") (on file with author).

[172] Chief Counsel Responses, *supra* note 147 (describing the "less successful" stipulated removal programs as those where "many" immigration judges hold hearings to determine whether the noncitizen's waiver is valid, a practice which document refers to as "making the use of a stipulated order pointless.").

[173] DHS/EOIR Liaison Meeting, DHS Agenda Items (Oct. 4, 2007) (ICE.08-1450(13).000022-23) ("ICE has noted that some immigration judges are not accepting stipulated orders [and] others are requiring in-person interviews before accepting any such orders . . . .") (on file with author); Chief Counsel Responses, *supra* note 147 (noting that

In other jurisdictions, ICE has successfully used stipulated orders, notwithstanding individual judges who insist on in-person hearings to test the validity of the waiver, by routing all requests to specific IJs who do sign them without holding hearings.[174] An internal ICE document purporting to reflect the practices of various jurisdictions reported that in one Southern California detention facility, a number of IJ's "won't do [stipulated removals]," but that the single IJ willing to sign them "is staying until 8:00 pm many evenings to complete" the orders.[175] The same document described the use of stipulated removal in the Northwest, where "we have approximately 1,000 stips a year" and they are "centralized in that they are signed off on by the Seattle IJs" because the immigration judge in Portland "does not sign off on any of them eventhough [*sic*] the Portland attorneys may be reviewing and forwarding to EOIR."[176] And an internal email written at the start of stipulated removal's expansion reported that ICE has "asked" that one immigration judge in Eloy, AZ, "not be assigned any [stipulated removal orders], and EOIR, recognizing the reasonableness of excluding him, has cooperated."[177] Indeed, EOIR data suggests that roughly ten percent of the entire immigration bench has been responsible for the majority of stipulated removals entered through mid-2010.[178] And in just over a three year time period, a single IJ in Miami, Florida signed almost 10,000 stipulated removal orders.[179]

At least in part as a response to disparity in IJs' treatment of stipulated orders, in September 2010 EOIR released an internal policy memo, in conjunction with ICE, that issued uniform forms for stipulated removal requests and that implicitly discourages IJs from holding in-person hearings to confirm the validity of the waivers.[180] The internal memo assumes, without further explanation, that a noncitizen's signature on the forms is sufficient proof that the

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in Boston, Buffalo, Honolulu, Houston, Los Angeles, New Orleans, New York, Newark, Phoenix, San Antonio, San Juan and Seattle, at least one—and in some cases all—of the immigration judges will not sign stipulated removal orders without a hearing). *See also* Department of Homeland Security, *U.S. Immigration and Customs Enforcement Salaries and Expenses* 50, available at http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf (noting "inconsistent application or acceptance of stipulated removal process," and describing creation of DHS-DOJ intra-agency working group "to resolve the issues which will allow all eligible detained aliens to request stipulated removal orders").

[174] Chief Counsel Responses, *supra* note 147.

[175] *Id.*

[176] *Id.*

[177] Email from P. Vroom to B. Howard, ICE Principal Legal Advisor, re: Administrative Stipulated Removals (Jan. 4, 2004) (ICE.08-1450(13).000205-07).

[178] *See* Koh et al., *supra* note 32, at 14 ("In the past decade, according to EOIR's own data, over 100,000 of the almost 160,000 stipulated removal orders entered were signed by only 20 immigration judges across the country."); ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 21 (2010) (noting that 226 IJs sit on immigration bench).

[179] *Id.* at 14 n.63 (9,642 orders signed by IJ Rex Ford) (original data on file with author).

[180] Stipulated Removal OPPM, *supra* note 30.

waiver of rights is knowing, voluntary and intelligent, and nowhere discusses how – beyond a review of the boilerplate forms – the IJ should confirm the validity of the noncitizen's waiver.

V. Stipulated Removal and the Problem of Due Process

This Part explores the due process implications of stipulated orders of removal. It first discusses the Supreme Court's holding that noncitizens who are criminally prosecuted for illegal re-entry may collaterally attack a prior removal order, as well as a recent illegal re-entry case from the Ninth Circuit that casts doubt on the validity of stipulated removal orders. It then places stipulated orders of removal under the familiar *Mathews v. Eldridge* procedural due process framework and concludes that the program in its current form – involving waivers of rights that occur solely on paper and in the depths of immigration detention facilities, with only the illusion of IJ review – runs afoul of due process.

a. Evaluating Stipulated Removal Through the Lens of Illegal Re-Entry

Despite the relatively significant numbers of stipulated orders entered in recent years, the federal courts have had minimal opportunities to review the stipulated removal process.[181] However, criminal prosecutions for illegal re-entry have provided the courts with some opportunity to evaluate stipulated orders of removal. The case explaining the availability of judicial review in this area is *United States v. Mendoza-Lopez*.[182] In *Mendoza-Lopez*, the Supreme Court held that a noncitizen facing a criminal charge of illegal re-entry has the Fifth Amendment due process right to collaterally attack the underlying deportation order where the civil immigration proceedings deprived the noncitizen of judicial review.[183] Congress later codified the right to collaterally attack a removal order in the illegal re-entry statute at 8 U.S.C. § 1326(d),[184] thereby giving rise to a body of caselaw in the criminal context that provides guidance on the immigration courts' adherence to due process principles.

Mendoza-Lopez also shed light on the obligations of Immigration Judges and the sufficiency of waivers obtained in immigration proceedings. The case arose out of the criminal prosecutions of two immigrants, both of whom had received their initial deportation orders after group hearings before an IJ.[185] They claimed that the IJ had failed to advise them of their right to counsel as well as of their right to apply for relief from deportation.[186] Because the federal government had conceded that the removal proceedings were fundamentally unfair, the Court did

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[181] *See supra* text accompanying notes at 117-21.

[182] 107 S.Ct. 2148 (1987).

[183] *Id.* at 2155-56.

[184] See 8 U.S.C. § 1326(d) (providing for collateral attack and requiring (1) exhaustion of administrative remedies, (2) that the underlying proceedings "improperly deprived" the noncitizen of judicial review, and (3) that "entry of the order was fundamentally unfair").

[185] 107 S.Ct. at 2151.

[186] *Id.* at 2151.

not engage in a detailed analysis of the IJ's actions. However, the Court agreed that the "Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments by respondents, and failed to advise respondents properly of their eligibility to apply for" a form of immigration relief known as suspension of deportation.[187] The Court thus found that "the waivers of their rights to appeal were not considered or intelligent,"[188] thus suggesting that the validity of a rights waiver would come under question where the noncitizen was unaware of available alternatives.

In *United States v. Ramos*, a decision issued in September 2010, the Ninth Circuit found due process and regulatory violations with a stipulated removal order executed in Eloy, Arizona.[189] The Ninth Circuit is the only federal appeals court to have evaluated the constitutional validity of stipulated removal orders. The Court identified three main due process and regulatory deficiencies in the stipulated removal order signed by Isaac Ramos, whose case is described in the Introduction to this Article. First, it found that Mr. Ramos had not validly waived his right to appeal the removal order. Mr. Ramos had been presented with a written form that was translated into Spanish, listed the rights he was waiving and stated that he voluntarily, knowingly and intelligently waived his rights. Nonetheless, the Court emphasized the ICE agent's lack of Spanish language proficiency, and a lack of any other evidence that he could understand the questions asked of him. Moreover, the Court stressed that without either counsel[190] or a hearing before an IJ, Mr. Ramos's only source of legal information came from an "immigration enforcement agent or deportation officer."[191] Relying on caselaw upholding the requirement that IJs inform noncitizens of eligibility for relief and the consequences of a removal order, the *Ramos* court found that Mr. Ramos "failed to receive the benefit of procedural safeguards necessary to ensure a valid waiver of the right to appeal."[192]

Second, the *Ramos* Court found that the right to counsel had been invalidly waived. Noting that noncitizens in removal proceedings have no Sixth Amendment right to government-appointed counsel, the Court drew attention to the obligation of the IJ to inquire into a noncitizen's desire for counsel and to assess whether a waiver of the right to counsel is voluntary and knowing.[193] The Court also rejected the government's argument that because Mr. Ramos had waived the right to counsel in writing, the IJ had no further obligation to assess the validity of the waiver. In response to the government's argument that the written nature of the waiver

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[187] *Id.* at 2156.

[188] *Id*.

[189] 623 F.3d 672, 675 (9th Cir. 2010).

[190] *Id*. at 681.

[191] *Id*.

[192] *Id*. at 682.

[193] *Id*.

served as proof of its validity, the Court emphasized that "The key question is whether the waiver is 'knowing and intelligent,' not whether it is verbal or written."[194]

Third, given the explicit regulatory requirement that the IJ "determine that the alien's waiver is voluntary, knowing, and intelligent,"[195] the *Ramos* Court found that EOIR had failed to follow its own rules. Stating that "[s]hortcuts frequently turn out to be mistakes,"[196] the Court emphasized that by signing the stipulated removal order, the IJ had failed to conduct any "independent inquiry," and instead "depend[ed] solely on information provided by DHS."[197]

The *Ramos* decision has given rise to some changes in the government's practices related to stipulated removal, at least in the Ninth Circuit. Stipulated removal orders appears to have continued in the Ninth Circuit since *Ramos*, but shortly after the decision was issued, at least some IJs interpreted the opinion to mean that stipulated orders of removal should cease completely.[198] The decision also impacted federal prosecutors' offices. The U.S. Attorney's Office in the San Diego appears to have refrained from seeking criminal prosecutions for illegal re-entry where the underlying removal order was a stipulated removal order,[199] and has readily conceded the defectiveness of stipulated removal orders in subsequent litigation.[200]

Outside the Ninth Circuit, however, the effects of *Ramos* remain to be seen. A skeptic might point to *Ramos* as an example of the Ninth Circuit's reputation as a liberal court that makes it an outlier with respect to immigration and criminal (among other) matters. The following section explains why *Ramos* correctly implies that stipulated removal fails under procedural due process standards beyond the four corners of Isaac Ramos's case.

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[194] *Id.* at 682.

[195] 8 C.F.R. § 1003.25(b).

[196] *Ramos*, 623 F.3d at 683 (citing Cano-Merida v. INS, 311 F.3d 960, 965 (9th Cir. 2002).

[197] *Id*. at 683.

[198] Months after the decision, the government argued that the decision had been "read by immigration judges as requiring a complete halt to stipulated removals across the Ninth Circuit," and requested that the Court of Appeals amend the opinion. In response, the Court stated that such a reading was "incorrect," reiterated that the decision simply required that stipulated removal orders be obtained in a manner to ensure that waivers were intelligent, knowing and voluntary, and instructed the United States to "reread the opinion." Order of Dec. 30, 2010, United States v. Ramos, No. 09-50059 (9th Cir.).

[199] *See* Sandra Dibble, *Questions Raised About Deportees Re-Entries*, U.T. SAN DIEGO (Aug. 20, 2011) (quoting U.S. Attorney Lauren Duffy of San Diego region stating that individuals found with prior stipulated removal orders generally not prosecuted for illegal re-entry).

[200] *See* United States v. Rodriguez-Ocampo, 664 F.3d 1275, 1276 (9th Cir. 2011) (conceding constitutional defects in prior stipulated removal order); United States v. Penaloza-Mejia, 2011 WL 293877 (E.D. Wash. Jan. 27, 2011) ("The USAO does not dispute that the underlying deportation proceedings were defective.").

b. Evaluating Stipulated Removal Through *Mathews v. Eldridge*

Under the Supreme Court's well-known holding in *Mathews v. Eldridge*, whether a particular procedural protection is necessary hinges on the balance among: (1) the private interests affected by the official action, (2) the risk of erroneous deprivation of those interests through the procedures used, and (3) the Government's interest, including the fiscal and administrative burdens that additional or new procedures would create.[201] In setting forth this framework, the Court emphasized that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances" but requires that "the procedures be tailored, in light of the decision to be made, to the 'capacities and circumstances of those who are to be heard' to insure that they are given a meaningful opportunity to present their case."[202] *Eldridge*, which involved the termination of social security benefits without a hearing, has been invoked frequently in the civil commitment context and in immigration proceedings.[203] Under the *Eldridge* civil due process framework, the use of stipulated orders of removal on unrepresented noncitizens facing removal fails, and calls out for reform.

1. Private Interests at Stake

The most obvious private interest implicated by the stipulated order of removal program is the noncitizen's ability to remain in the United States. Although the Court has repeatedly refused to characterize deportation as a form of criminal punishment, it has recognized the profound impact that deportation can have on a noncitizen, noting for instance that "deportation is a drastic measure and at times the equivalent of banishment or exile."[204] The liberty interests at stake with removal decisions apply with particular force to lawful permanent residents (LPRs), who are lawfully present in the United States, often have deep ties to the country and have been described by one scholar as "Americans in waiting."[205]

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[201] Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

[202] *Id*. at 349.

[203] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 33 (1982) (acknowledging due process argument under *Mathews v. Eldridge* and remanding to court of appeals); Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998) (finding violations of procedural due process under Eldridge where then-INS obtained waivers of rights in civil document fraud cases); Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENGL. L. REV. 373 (2011) (applying *Mathews v. Eldridge* to right of mentally disabled individuals in removal proceedings to counsel); Cesar Cuauhtemoc Garcia Hernandez, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L. J. 17 (2011) (arguing that DHS policy of transferring detained LPRs constitutes violation of due process under *Mathews v. Eldridge*).

[204] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). *See also* Landon v. Plasencia, 459 U.S. at 34 (noting that alien's interest in deportation proceedings "is, without proceedings, a weight one" because "[s]he stands to lose the right 'to stay and live and work in this land of freedom.'") (quoting Bridges v. Wixon, 326 U.S. 135 (1945)).

[205] HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006).

In the case of non-LPRs, particularly undocumented immigrants, the liberty interest in remaining in the country is arguably weaker but still cognizable. Many undocumented immigrants develop strong ties to the United States that are akin to those of lawful permanent residents.[206] An increasing number of undocumented immigrant live in the United States for long periods and have family, communal and personal ties to the country such that deportation would strip them, in the Supreme Court's words, of "all that makes life worth living."[207] Initiatives such as the DREAM Act[208] and the Obama Administration's attempts to expand the exercise of prosecutorial discretion[209] illustrate a growing (though not majority) consensus that large swaths of the undocumented population have claims to reside in the U.S. that are philosophically and (to some degree) politically persuasive, even if not fully accounted for by current doctrine.

In light of the strength of a noncitizen's liberty interest in remaining in the United States, the courts have consistently recognized that procedural due process requires a fundamentally fair hearing or other procedure to effectuate removal.[210] These constitutionally grounded rights are reflected in the INA and in the federal immigration regulations,[211] and apply equally to LPRs and non-LPRs alike.[212] Several key components of a fundamentally fair hearing include being properly advised of the right to appeal an IJ's decision, the right to obtain counsel at one's own expense, and the right to apply for relief from removal – deprivations of which have been construed by the courts as violations of procedural due process.[213]

Another relevant interest is the right to physical liberty. In the context of stipulated orders of removal, the vast majority of which are used on immigrant detainees, the interest in

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[206] For instance, one study has found that 37 percent of undocumented adults have U.S. citizen children. Jeffrey Passell and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (2009). Another study indicated that 45 percent of undocumented immigrants live with a spouse or child(ren), compared to 21 percent of U.S. born adults, indicating the existence of strong family ties amongst the undocumented population. Jeffrey S. Passell and Paul Taylor, *Unauthorized Immigrants and their U.S.-Born Children* 4 (2010).

[207] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)

[208] The DREAM Act would provide lawful status to undocumented immigrants who came to the U.S. as children and attend either college or enroll in the military. *See* Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

[209] *See generally* Wadhia, *supra* note 120.

[210] *See supra* notes 224-37 and accompanying text.

[211] 8 U.S.C. § 1229a(c)(5) (requiring an immigration judge to affirmatively "inform the alien of the right to appeal" if ordered removed); 8 C.F.R. § 1003.3 (affected parties "shall be give notice of the opportunity for filing an appeal."); 8 U.S.C. § 1229a(b)(4) (right to counsel); 8 C.F.R. § 1240.11(b) (immigration "shall" advise of eligibility for relief).

[212] *See* Chin Yow v. United States, 208 U.S. 8 (1908); Nafaf-Ali v. Meese, 653 F. Supp. 833 (N.D. Cal. 1987) (right to present witnesses and right to fair hearing); Augustin v. Sava, 735 F. 2d 32 (2d Cir. 1984 (right to adequate interpretation), Dakane v. Att'y Gen., 399 F.3d 1269 n. 6 (11th Cir. 2005) (right to effective representation).

[213] *See supra* notes 224-37 and accompanying text.

being free from detention weighs heavily on the due process analysis. A liberty interest in remaining free from incarceration applies in two ways as a result of stipulated removal. First, noncitizens have an interest in avoiding civil immigration detention during the removal proceedings or pending physical removal. Indeed, in *Zadvydas v. Davis*, the Supreme Court recognized that immigration detention implicates a liberty interest that "lies at the heart of the liberty that the Clause protects,"[214] notwithstanding the fact that the noncitizen had already been ordered removed. Several years later, the Court further recognized a liberty interest in the immigration detention context for aliens who had not yet been legally "admitted."[215] Second, noncitizens who waive their rights via stipulated orders of removal may also have a liberty interest in avoiding incarceration in a prison or jail pursuant to a criminal conviction under federal illegal re-entry statutes, particularly given its draconian sentencing scheme.[216]

2. Risk of Erroneous Deprivation of Private Interests

The second *Eldridge* factor involves the risk that private interests will be erroneously deprived under existing procedures and the probable value, if any, of additional procedures.[217] In the stipulated removal context, the primary error is that the government will deport individuals who otherwise have claims to alternative forms of relief, including voluntary departure. Given the nature of deportation, the cost of error is especially high. The termination of a property interest like social security benefits, which were at stake in *Eldridge*, can be corrected through a post-termination hearing that gives rise to the restoration of property. But the physical removal of a noncitizen often ends the individual's ability to correct the error altogether, due to the obstacles to obtaining legal redress following physical removal.[218]

A component of the risk of erroneous deportations is the risk that immigrants agreeing to stipulated orders of removal will engage in invalid waivers of their rights. Constitutionally protected interests can be waived in various contexts. Although the jurisprudence surrounding waivers of rights is far from coherent or uniform,[219] the standard inquiry involves determining whether an individual made a considered and intelligent decision. IJs are required by regulation to find that a noncitizen's decision to opt for a stipulated removal order was "voluntary, knowing and intelligent"[220] – the same standard that applies to waivers of rights across the civil and

[214] Zadyvdas v. Davis, 533 U.S. 678, 690 (2001)

[215] Clark v. Martinez, 543 U.S. 371 (2005).

[216] *See* Keller, *supra* note 93.

[217] Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

[218] These difficulties include the challenge of litigating one's case from abroad, gaining physical re-entry after an erroneous deportation, and the continued operation of the post-departure bar in some circuits.

[219] *See* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (comparing doctrines of criminal waiver, in which courts generally allow defendants to waive constitutional rights, with doctrine of unconstitutional conditions, which views waivers of rights with greater skepticism).

[220] 8 C.F.R. § 1003.25(b).

criminal legal systems.[221] Determining the existence of an invalid waiver typically requires a case-by-case analysis and a consideration of the nature of the right involved.[222] Courts have found an invalid waiver where the judge failed to adequately inform a noncitizen of their options, including their right to counsel, right to appeal, other viable legal alternatives, and the consequences of the waiver.[223] In light of the relevant legal standard, the risk of error in the stipulated removal process arises both from (1) risks resulting from the lack of in-person IJ review, and (2) risks resulting noncitizens' interactions with ICE agents, which immigration courts rely on as a substitute for IJ review. The absence of counsel, language barriers, and the complexity of the immigration laws compound the information deficits that noncitizens face.

Absence of In-Person Review from Immigration Judge. Due process has been held to require that an IJ, before determining that the noncitizen has validly waived the right to counsel, first "specifically inquire as to whether petitioner wishes to continue without a lawyer" and second, "receive a knowing and voluntary affirmative response."[224] The courts have also recognized a connection between the right to counsel and the ability to make a considered and intelligent waiver of the right to appeal, given that one's ability to decide whether to pursue appeal depends in large part on the strength of one's legal claims.[225] Indeed, the Board of Immigration Appeals has recognized that "in cases involving unrepresented aliens, more detailed explanations" of the right to appeal by IJs "are often needed."[226] In the stipulated removal context, the risk of an erroneous due process violation is particularly high. The vast majority of noncitizens who opted for stipulated orders of removal were not represented by counsel in the first instance. And because an IJ signed off on the removal order without holding an in-person hearing, they were not asked if they wished to retain counsel. They therefore had little to no access to accurate legal information needed in order to make considered and intelligent waivers.

The elimination of the noncitizen's opportunity to appear before the IJ makes it nearly impossible for IJs to fulfill their duties to the noncitizen, duties which are also aimed at

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[221] *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Fuentes v. Shevin, 407 U.S. 67, 95 c.31 (1972); Gete v. INS, 121 F.3d 1285, 1293 (9th Cir. 1997).

[222] *See, e.g., Zerbst*, 304 U.S. at 464 (noting, in criminal case, that whether valid waiver exists "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.")

[223] *See, e.g.*, Gete v. INS, 121 F.3d 1285, 1293 (9th Cir. 1997) (finding that no knowing waiver of right to judicial review to challenge INS forfeiture of vehicles, where aliens given choice to either seek judicial remedy or administrative remedy but not even told explicitly that choosing less onerous administrative remedy would give up right to judicial review).

[224] Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074 (9th Cir. 2007).

[225] *See* Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) (finding no valid waiver of right to appeal where noncitizen not provided with continuance necessary to obtain counsel, where noncitizen "was under the misapprehension that he had no choice but to waive appeal and he labored under that cloud because he had been denied counsel).

[226] Matter of Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1323 (BIA 2000). Even where the noncitizen was represented by counsel, the courts have found due process violations where neither the lawyer nor the IJ specifically advised the noncitizen about the consequences of waiving appeal. *See* Narine v. Holder, 559 F.3d 246 (4th Cir. 2009).

preserving due process and maintaining the integrity of the proceedings. What kind of standard applies to IJs? For IJs to determine whether a noncitizen's waiver of appeal was valid, courts have suggested that the IJ must generally engage in an individualized colloquy with the noncitizen to ensure that the noncitizen wishes to waive the right.[227] Courts have found violations of due process where the IJ failed to clarify the difference between waiving an appeal and agreeing that the judge's order was the "final one"[228] or where an IJ held a group deportation hearing and asked respondents to stand if they wished to waive appeal.[229]

IJs must also advise noncitizens of any apparent eligibility for relief,[230] which courts have held to include voluntary departure.[231] As the Second Circuit has explained, because "many aliens are uncounseled, our removal system relies on IJs to explain the law accurately to pro se aliens."[232] The Second Circuit went on to explain that "[o]therwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal."[233] Under stipulated removal, the noncitizen never receives an advisal on eligibility from the IJ. To be sure, some circuits do not treat an IJ's failure to advise on eligibility for relief as a due process violation, relying largely upon the principle that a grant of relief from removal is purely discretionary and therefore not a right to which noncitizens are entitled.[234] However, as one scholar has persuasively argued, the refusal to treat inadequate or nonexistent advisals as constitutional errors lies in a fundamental misunderstanding about the nature of immigration relief.[235] As the Supreme Court emphasized in *INS v. St Cyr*, even if the right to ultimately receive relief from removal is a matter of administrative discretion, the correct application of rules governing eligibility does give rise to a cognizable right.[236] Moreover, the

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[227] *See* United States v. Chavez-Huerto, 972 F.2d 1087 (9th Cir. 1992) (upholding waiver where one-on-one colloquy between immigration judge and noncitizen); United States v. Zaleta-Sosa, 854 F.2d 48 (5th Cir. 1988) (same); United States v. Nicholas-Armenta, 763 F.2d 1089 (9th Cir. 1985) (upholding waiver where "particularized inquiry").

[228] Rodriguez-Diaz, 22 I. & N. Dec. at 1322. *See also* United States v. Fares, 978 F.2d 52 (2d Cir. 1992).

[229] United States v. Lopez-Vasquez, 1 F.3d 751, 753 (9th Cir. 1993).

[230] 8 C.F.R. § 1240.11(b).

[231] *See, e.g.*, United States v. Ortiz-Lopez, 385 F.3d 1202 (9th Cir. 2004) (due process rights violated when IJ failed to inform defendant that eligible for voluntary departure instead of removal).

[232] United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004).

[233] *Id.*

[234] *See* Bonhometre v. Gonzales, 414 F.3d 442, 448 n. 9 (3d Cir. 2005); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002); Oguejiofor v. Attorney Gen. of the United States, 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001); Ashki v. INS, 233 F.3d 913, 921 (6th Cir. 2000)

[235] *See* Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Re-entry After St. Cyr*, 19 GEO. IMMIGR. L. J. 455 (2005).

[236] INS v. St Cyr, 533 U.S. 289, 307 (2001) ("Traditionally, courts recognized a distinction between eligibility for discretionary relief on the one hand, and the favorable exercise of discretion, on the other hand.").

Ninth and the Second Circuits reject the other courts' view, holding that the duty to inform a noncitizen whether he or she appears to be eligible for relief, even discretionary forms of relief, is required by due process. Given that the two circuits which arguably have the most experience with, and arguably the strongest expertise in, immigration matters[237] take a strong view of the IJ's duty to advise a noncitizen of potential eligibility for relief, their view should be treated as the majority one.

Worse yet, ICE has by its own admission engaged in and relied on blatant judge-shopping in order to achieve high numbers of stipulated orders of removal in at least some parts of the country. By identifying specific IJs who are willing to sign stipulated removal orders without holding in-person hearings to assess the validity of the noncitizen's waiver, and then routing all requests for stipulated orders to those specific judges,[238] the administrative agency has explicitly manipulated the judicial process in a way that under almost any standard violates the fundamental fairness of the proceedings. The egregiousness of ICE's procedural manipulation is even more pronounced given the legitimacy problems currently facing the immigration courts. A well-known study has demonstrated that the single most influential factor affecting the success of an immigrant's case tends is the identity of the IJ to whom the case is assigned.[239] And concerns about the influence of political hires in the IJ selection process during the Bush Administration have also arguably undermined public confidence in the immigration courts.[240] The practice also throws into question the quality of the paper-only review that IJs do conduct. Given that only twenty IJs signed over 100,000 of the 160,000 stipulated removal entered through mid-2010, it is likely that those judges' review of the file was brief and cursory.

By signing a stipulated removal order without an in-person hearing, the IJ thus relies on the noncitizen's interaction with front-line ICE agents instead of engaging in a substantive exchange with the noncitizen. An analysis of these interactions suggests, however, that the risk of error is unacceptably high.

Quality of ICE Agent Interaction with Noncitizens Selected for Stipulated Removal. Another factor that raises the risk of error is that noncitizens sign stipulations based solely on information they receive from ICE. As noted, informal scripts used by government agents to

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[237] The Ninth and Second Circuit both hear the greatest number of immigration petitions than any other circuit in the country, and immigration petitions constitute a higher percentage of the Courts' overall docket in comparison to other circuits. *See* LAW, *supra* note 178, at 154 (showing Ninth Circuit as havfing 54 percent of nation's immigration appealsin 2005, and discussing disproportionate volume of cases in Ninth and Second Circuits); Lenni B. Benson, *The Immigration Opinions of Judge Michael Daly Hawkins 1994 to 2010*, 43 ARIZ. ST. L. J. 7, 9-10 (2011) (noting that immigration petitions represented 27 percent of Ninth Circuit's docket in 2009); John R. B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 968-99 (2006) (noting that petitions for review from BIA constituted 36 percent of Second Circuit's docket).

[238] *See supra* discussion accompanying notes 174-79.

[239] *See generally* Ramji-Nogales et al., *supra* note 17.

[240] *See generally* U.S. Dep't of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (2008), available at http://www.justice.gov/oig/special/s0807/final.pdf; Legomsky, *War on Independence*, supra note 18.

describe the stipulated order of removal process reveal blatant misinformation and misrepresentations about the immigration laws. Given the disparity between the interests of ICE agents and noncitizens, it seems likely that ICE agents do not generally provide immigrant detainees with comprehensive and accurate information about their legal options to fight removal. Even outside the stipulated removal setting, for instance with voluntary departure grants, ICE has been known to engage in a pattern and practice of coercing noncitizens into accepting physical removal.[241] In the stipulated removal context, the absence of any oversight, policy, or rule affecting ICE agents during the solicitation process makes the entire process particularly vulnerable to error.

The potential for error created by language barriers in the stipulated removal process is significant. Although the stipulated removal forms most recently published by EOIR contain a Spanish language translation, the governing immigration regulations contain no requirement that ICE officers who offer stipulated removal orders speak other languages fluently, or even intelligibly. Unlike immigration court proceedings, in which statements made by and to a Limited English Proficient noncitizen must be interpreted through an official court interpreter,[242] ICE agents' communications with non-English speaking detainees are not subject to explicit regulation. In many cases, the quality of communication may depend on whatever Spanish-language trainings are conducted by the agency, if those trainings occur at all,[243] Nonetheless, these same officers' conversations are relied on by IJs to determine the validity of the waiver.

The complexity of the immigration laws compound the problems raised by the absence of counsel and IJ review. For those who face purely civil grounds of removal and therefore presumably do not have a disqualifying criminal conviction,[244] voluntary departure may present a superior alternative to opting for a stipulated order of removal. Indeed, district courts have found due process violations in illegal re-entry appeals where IJs signed stipulated removal forms while neglecting to advise the detainee of his eligibility for voluntary departure,[245] and

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[241] *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (affirming permanent injunction entered after finding that then-INS and Border Patrol agents engaged in practice and pattern of coercing Salvadoran nationals into accepting voluntary departure).

[242] *See* 8 C.F.R. § 1003.22. The policy of providing only partial interpretation in immigration court, as opposed to interpretation of the entire proceeding, carries problems as well. *See* Muneer Ahmed, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1027 (2007).

[243] ICE reportedly "eliminate[d] formal language training requirements for new ICE agents in 2003," and it is not clear whether it has restored those requirements. *See* Democratic Staff of the Homeland Security Committee for U.S. House of Representatives, *Decision Eliminating Spanish and Other Language Training for ICE Investigators Was a Mistake* 2 (June 28, 2005), available at http://chsdemocrats.house.gov/SiteDocuments/20060912174546-40413.pdf.

[244] *See* 8 U.S.C. § 1229c(a)(1) (permitting voluntary departure in lieu of, or prior to completion of removal proceedings, if alien not deportable under INA section 237(a)(2)(A)(iii)(conviction for aggravated felony) or INA section 237(a)(4)(B)(terrorist activities)).

[245] United States v. Penaloza-Mejia, 2011 WL 293877 (E.D. Wash. Jan. 27, 2011); United States v. Soto-Castelo, 621 F.Supp.2d 1062 (D. Nev. 2008); United States v. Gomez-Hernandez, 2008 WL 2096876 (E.D. Wash.)

appeals courts have held the same outside of the stipulated removal context.[246] However, ICE agents have thus far failed to even inform many immigrant detainees about the option of voluntary departure or the relatively harsher consequences of receiving a stipulated removal order in comparison to a grant of voluntary departure.

What about those noncitizens who face removal for criminal convictions (and might therefore be ineligible even for voluntary departure)? Would it be better to instead concentrate the use of stipulated removal on noncitizens whose criminal convictions lead to an immigration penalty?[247] The problem here also implicates the complexity of the immigration laws, under which determining whether a particular conviction actually falls under one of the immigration law's many categories of removable crimes can involve a lengthy, complicated analysis that typically requires the intervention of a lawyer.[248] Given the actual sophistication required to decipher the impact of a particular criminal conviction on an individual's eligibility for relief, ICE agents' statements indicating that "any" conviction for "assault or battery" will render an immigrant ineligible for relief or release on bond is simply incorrect as a matter of law,[249] and might constitute reversible error if conveyed by an IJ or immigration lawyer.[250]

The role of the DHS trial attorney – the only attorney who does participate in the approval of a stipulated removal order – further enhances the potential risk of error. Because DHS attorneys are not required to screen noncitizens who are eligible for relief from removal, or whose charges of removability do not meet the relevant burden of proof, their cursory review of the file contributes to the illusion of due process without providing substantive value. Indeed,

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[246] *See, e.g.*, United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir.1980) (finding that failure to inform respondent of his right to contact Mexican consul prejudiced him because he could have applied for voluntary departure rather than deportation); United States v. Ortiz-Lopez, 385 F.3d 1202 (9th Cir. 2004) (finding violation of due process rights where immigration judge failed to inform defendant of eligibility for voluntary departure instead of removal); United States v. Melendez-Castro, __ F.3d __ (9th Cir. Jan. 18, 2012) (finding invalid waiver of appeal where IJ told respondent, in group deportation hearing, that he was eligible for voluntary departure but then stated that IJ would never grant voluntary departure to respondent).

[247] A draft report of an Administrative Conference of the United States report on immigration adjudication initially recommended concentrating the use of stipulated removal on noncitizens with prior convictions, including *pro se* detainees. The authors of the report later modified the recommendation in response to comments highlighting the due process problems associated with stipulated removal. *See* Lenni B. Benson and Russell R. Wheeler, *Interim Draft: Enhancing Quality and Timeliness in Immigration Removal Adjudication* 49 (Jan. 12, 2012) available at http://www.acus.gov/wp-content/uploads/downloads/2012/01/ACUS-Immigration-Removal-Adjudication-Draft-Report-1_12_12.pdf.

[248] *See* Koh, *supra* note 49.

[249] A number of cases have held that simple assault or battery are not categorically crimes involving moral turpitude. *See, e.g.*, Matter of Sanudo, 23 I&N Dec. 968, 97073 (BIA 2006) (domestic battery under California law); Matter of Sejas, 24 I&N Dec. 236 (BIA 2007) (assault and battery under Virginia law). Many simple assault and battery statutes carry maximum sentences that are less than one year, placing themselves outside of the ambit of the aggravated felony category. *See* 8 U.S.C. § 1101(a)(43)(F).

[250] *See, e.g.*, United States v. Penaloza-Mejia, 2011 WL 293877 (E.D. Wash. Jan. 27, 2011) (finding, under categorical and modified categorical analysis of prior conviction, that conviction did not constitute an "aggravated felony" for immigration law purposes and would not have disqualified noncitizen who agreed to stipulated removal from voluntary departure).

given the caseloads of trial attorneys, who have been reported to have only twenty minutes to prepare an entire case before a final merits hearing,[251] it is unrealistic to believe that trial attorney review of requests for stipulated orders of removal offers substantive value. While DHS attorneys do not owe specific duties to the noncitizen, they are nonetheless responsible for upholding the Constitution and maintaining the integrity of the removal and enforcement process and should therefore refrain from concurring in the stipulated removal process, given its defects.

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One problem with assessing the risk of error inherent in the stipulated removal process, however, is that it is difficult to know with precision how many immigrants who are deported via stipulated removal might have ultimately either been eligible for, or received, relief. To be sure, the immigration laws leave many, even those with longstanding ties to the United States or otherwise positive contributions to the country, without any avenue through which to fight removal. For those who do not qualify for any immigration relief, receiving a stipulated removal order may truly represent the best option. However, EOIR's own statistics suggest that a significant number – *forty-five percent*, or almost half— of noncitizens who pursue their cases before an IJ ultimately receive an outcome better than a formal removal order, meaning that they receive some form of relief from removal (including voluntary departure) or termination of the case.[252] Admittedly, immigrants who opt for stipulated removal may arguably have weaker claims to relief or termination as a group, so that the numbers alone may not suggest an error rate of, say, forty-five percent. Nonetheless, the meaningful number of immigrants who ultimately receive alternatives to formal removal, in combination with the severe risk of error inherent in the procedures used during stipulated removal, together lend credence to the claim that the risk of error is constitutionally unacceptable.

3. Government Interests

The third *Eldridge* factor involves the interest of the government in the conservation of fiscal and administrative resources.[253] As discussed, the fiscal and administrative burdens facing immigration adjudication are formidable. At first glance, stipulated orders of removal may seem to offer a compelling way to alleviate some of the burdens on IJs to meet case completion deadlines. They may also appear to provide a simple solution to a perceived lack of detention bed space, as well as both the noncitizen and government's interest in reducing the average length of time that immigrant detainees spend in federal custody prior to removal. According to one estimate, stipulated removal orders might have provided an estimated cost savings of $100

[251] *See* Chicago Appleseed, *supra* note 20, at 16 (discussing caseloads of DHS trial attorneys).

[252] *See* EOIR, 2011 Yearbook at D2, Q1 (showing 11.6 percent of cases resulting in termination, 14.4 percent in a grant of relief other than voluntary departure, and 19 percent in voluntary departure). Because voluntary departure can be granted either by an immigration judge or by ICE, these numbers do not reflect the total numbers of noncitizens who were initially charged with removal, but who the immigration agency ultimately decided to offer voluntary departure in lieu or continuing with removal proceedings.

[253] Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

million in fiscal year 2010.[254]

However, a narrow focus on fiscal costs risks an incomplete due process analysis. The *Eldridge* Court recognized that the government's efficiency interests, while relevant, should not be given undue consideration, and emphasized that the "ultimate balance" should focus on "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[255] In the immigration context, the federal courts have weighed the limitations of due process against the practical realities of overburdened immigration courts before. One court has noted, for instance, that "we cannot allow a 'myopic insistence upon expeditiousness' to render the right to counsel 'an empty formality.'"[256] In identifying the government's interests, it is necessary to recognize the government's interest in the *accurate* adjudication of removal cases. The government also has a broader investment in principles that have long animated the immigration laws, such as family unity, economic growth, and humanitarian concerns.

Another problem with the argument that stipulated orders of removal offer an effective cost-saving measure by pointing to reductions in case calendaring time or the cost of detention, is that it obscures the true costs of stipulated removal and instead focuses only on fiscal efficiencies that occur at the front end of the process. Constitutional errors are expensive. Failure to reform the stipulated removal process is likely to lead to further litigation across both the civil and criminal systems. Indeed, stipulated removal may constitute only the first step in a multi-stage chain of enforcement that could include the civil reinstatement of the prior stipulated removal order by ICE, as well as an illegal re-entry prosecution in the criminal system. But continuing to employ a flawed procedure at the front end is likely to exacerbate costs at the back end, through the cost of federal criminal appeals and their attendant consumption of resources for the judiciary, prosecutor's offices, and public defender's offices. From ICE's and EOIR's perspective, shifting costs from the immigration adjudication and enforcement system to the federal criminal justice system may not be problematic; however, an appropriate due process analysis should take into account the full range of costs created by the system.

Once the costs of the current stipulated removal procedure are exposed, it becomes clear that the alternatives are far less costly. Indeed, some alternatives to the implementation of stipulated orders of removal may continue to offer fiscal and administrative benefits to the government. These alternatives are discussed in the following section.

VI. Policy Recommendations and Conclusion

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[254] *See* Letter from American Immigration Lawyers Association to Charles K. Edwards, Acting Inspector General, 5 & n.23 Aug. 2011 (on file with author).

[255] *Eldridge*, 424 U.S. at 348.

[256] Biwot v. Gonzales, 403 F.3d 1094, 1099 (9th Cir. 2005) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)). *See also* Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074, 1084 (9th Cir. 2007)… ("As frustrating as delays might be, an immigrant's right to counsel should not be sacrificed because of the shortcomings of the immigration system itself").

Despite the problems with the current implementation of stipulated removal, if reformed, the program has potential to address some of the problems in immigration adjudication. If stipulated removal remains available to those noncitizens for whom stipulated removal presents the best option, or who genuinely wish to return to their country, then it can fulfill its original vision of offering meaningful benefits to both sides. Stipulated removal has the potential for improvement through solutions that ameliorate the due process concerns raised in this Article, without requiring intervention from Congress.[257] This Part discusses those potential solutions.

a. Opportunity for Immigration Court Hearing or Attorney Consultation Before Issuance of Stipulated Removal Order

One of the fundamental problems with the stipulated order of removal process is the unrepresented noncitizen's disproportionate reliance on the statements of an ICE agent who offers the stipulated order itself, in combination with the boilerplate form prepared by the administrative agency. To account for the misinformation and pressure likely to develop in this setting, ICE and EOIR should limit the use of stipulated orders of removal on *pro se* immigrant detainees to those who either (a) appear in-person for an IJ hearing after the noncitizen has agreed to the order, but before the judge signs the removal order, or (b) have had a meaningful opportunity to consult with an attorney who does not owe any duties to the government. These reforms, which are best suited for regulatory amendment, would seek to displace some of the power that front-line ICE agents currently have over the noncitizen.

Requiring an immigration court hearing after the noncitizen signs the stipulated order request, but before the judge signs the final order of removal, would mirror the procedures currently used in criminal court to ascertain the validity of a criminal defendant's guilty plea.[258] Through the use of a brief, in-person colloquy, akin to those required by Rule 11 of the Federal Rules of Criminal Procedure, IJs could engage in an independent determination of whether the noncitizen's waiver of rights was "knowing, voluntary and intelligent" as required by the federal regulation. At the hearing, the IJ could ask the noncitizen whether they understood what they were signing when they agreed to the stipulated removal order, and whether they experienced pressure or coercion with the ICE agent who offered the order to them. The IJ should affirmatively explain to the noncitizen the rights that she is waiving. The IJ would also have an opportunity to comply with his or her duties to the noncitizen, such as advising the noncitizen of any apparent eligibility for relief. By contrast to the practice in some jurisdictions, all requests for stipulated orders of removal – like any other matter – should be randomly assigned to all IJs within a particular court, not routed to only those judges who are willing to sign the orders.

As an alternative to requiring in-person hearings before IJs, EOIR could require that unrepresented noncitizens submit proof that they individually consulted with an attorney who advised them of their eligibility for immigration relief and the consequences of signing a

[257] In recent years, the Obama Administration and policymakers seeking immigration law reform have looked to solutions that do not require legislative action, and scholars have begun to probe the implications of the executive role in setting immigration policy. *See generally* Adam Cox and Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

[258] *See* Federal Rules of Criminal Procedure, Rule 11.

stipulated removal order before judges sign off on stipulated removal orders. While the attorneys need not commit to full representation of the noncitizen in the removal matter, attorneys affiliated with a Legal Orientation Program (LOP) could submit a short declaration attesting that they discussed the noncitizen's legal options with the detainee and, if relevant, that the detainee attended a group presentation prepared by the LOP provider. ICE and EOIR might also recruit pro bono lawyers from the immigration bar to assist with the individual consultation process. Important limitations on this proposal exist, given the relative unavailability of LOP. Nonetheless, where LOP exists, stipulated orders of removal might be structured in collaboration with LOP providers.

Two primary objections to this proposal may arise, from opposite ends of the ideological spectrum. The first objection would focus on cost, and come from the government, or those who believe that efficiency, costs and the objective of deporting noncitizens who have violated the immigration laws should generally outweigh concern for due process rights. To be sure, requiring either an immigration court hearing or an individual consultation with a lawyer would involve some additional cost, principally in the form of additional immigration court time or detention, or government resources required for individual attorney consultations. However, costs alone fail to serve as a sufficient justification for failure to comply with constitutional requirements.[259]

A second objection could come from the perspective of those who possess a philosophical commitment to fairness in removal proceedings, but view the promise of additional procedures with cynicism. Do more hearings or attorney consultations offer a true solution, particularly given the complexity of the immigration laws, shortcomings of immigration adjudication and complaints about the quality of the immigration bar? Or will it simply replace one pro forma procedure with another? Indeed, one might point to the criminal justice system – where constitutional rights attach with full force – and argue persuasively that despite the existence of Rule 11 and its state law counterparts, criminal defendants routinely plead guilty to crimes that they did not commit, without fully understanding the implications of a guilty plea.[260] Indeed, criminal law scholars have powerfully documented the disconnect between the rights guaranteed by constitutional criminal procedure and the practical reality of the criminal justice system.[261]

But requiring more process, rather than less, is nonetheless a step that would constitute a meaningful improvement in comparison to the current process. Colloquies between IJs and noncitizens would be recorded, thereby allowing for appellate review and discussion of the merits of the process, instead of allowing stipulated removal to remain shrouded in relative

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[259] *See supra* Part V.b.3.

[260] One might look no further than the poor quality of Rule 11 colloquys in federal immigration prosecutions for evidence of the potential for deficiencies and shortcuts. *See generally* Lydgate, *supra* note 27. *See also* Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 276-77 (2006) (questioning value of plea colloquy in ensuring voluntariness of guilty plea due to judge's limited access to information).

[261] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536-37 (2001).

secrecy and conducted in the back halls of immigration detention facilities. IJs who have embraced stipulated removal orders in their current form may well treat such hearings with indignation; however, appellate review would remain available in those instances.

b. Regulate ICE Agents' Interactions With Detainees During Solicitation Phase

The stipulated removal statute and regulations are completely silent with respect to how ICE agents conduct the "solicitation phase" of the stipulated removal process, thereby creating a procedural void that ICE agents have filled with their own scripts, procedures, and practices. As illustrated by the Spanish-language scripts that have organically developed in ICE offices without meaningful oversight, the current procedures appear to be woefully inadequate from a due process perspective. In other removal contexts, federal regulations prescribe small but important limitations on ICE officer behavior. For instance, the regulations governing administrative removal (for non-LPRs facing removal for aggravated felony convictions) require that the process be handled by two different officers, an issuing officer (who brings the charges) and a deciding officer (who evaluates the evidence of removability against the noncitizen).[262] Under the administrative removal regulation, the officers must provide the noncitizen with notice of the charges against her,[263] sufficient time to rebut the written charges,[264] and under some circumstances must refer the case to an IJ if the evidence against the noncitizen is insufficient.[265] The stipulated removal regulation, by contrast, contains no such limitations on ICE agent behavior.

DHS should promulgate regulations that specifically require ICE officers to provide noncitizens selected for stipulated orders of removal with formal notice of the charges against them and an opportunity to examine the charges. The regulations should also provide guidance so that ICE officers comply with the recommendation to limit stipulated orders of removal to situations where a noncitizen appears for an immigration court hearing or consults individually with an attorney. For instance, the regulations might impose a waiting period between the time the noncitizen agrees to the stipulated removal order and the time an IJ actually signs it, to ensure that the noncitizen has an opportunity to consult with an attorney.

In addition to formal regulations, DHS could issue subregulatory guidance and training to ICE officers that safeguard the procedural integrity of stipulated removal orders. The guidance could set forth clarification to ICE officers on how to avoid pressuring, or creating the perception of pressure, when offering stipulated orders of removal to immigrant detainees. For instance, to prevent ICE officers from blatantly misstating the law or legal options available to detainees, DHS could develop guidelines that reflect the substantive legal information that ICE officers must convey, or require any scripts used by ICE officers to be approved at the supervisory level.

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[262] 8 C.F.R. § 238.1(a) (defining the "deciding service officer" and "issuing service officer," and stating that the two officers must be different people).

[263] 8 C.F.R. § 238.1(b)(2).

[264] 8 C.F.R. § 238.1(c).

[265] 8 C.F.R. § 238.1(d)(iii)

ICE already requires LOP providers to obtain approval of the training materials they use to provide legal rights presentations to immigrant detainees; it could institute similar requirements for its own officers.

c. Presumption of Constitutional Invalidity for Prior Stipulated Removal Orders

Stipulated removal's structural deficiencies should also give rise to a presumption that stipulated removal orders entered to date against unrepresented immigrants, under the practices described in this Article, are constitutionally invalid. A presumption of constitutional invalidity would primarily affect three federal entities: United States Attorneys offices prosecuting immigration violations, immigration adjudicators (primarily IJs and the BIA), and the federal judiciary.

First, federal criminal prosecutors should, like the United States Attorney's Office in the Southern District of California, refrain from seeking illegal re-entry prosecutions where the underlying removal order was a stipulated order.[266] Noncitizens who re-enter after having previously received a stipulated removal order would still remain criminally liable for misdemeanor illegal entry, but would avoid the harsh sentencing scheme that accompanies illegal *re*-entry. Federal prosecutors should also refrain from seeking sentencing enhancements in illegal entry cases, where the enhancement is based on the existence of a stipulated removal order.[267] These exercises of criminal prosecutorial discretion would ameliorate some of the sting of stipulated removal orders that have been thus far.

Second, the immigration agency – namely, IJs and the BIA – should apply the presumption of constitutional invalidity in civil immigration cases involving stipulated orders of removal. The presumption would appear most frequently in motions to reopen before either trial- or appellate-level agency adjudicators, in which an immigrant might allege that her waiver of rights was invalid and seek to assert relief to which she is eligible. Under current law, an immigrant who claims that a written waiver was obtained invalidly generally has the burden of proving otherwise.[268] Such a presumption would result in the burden of proof shifting to the agency to show, for instance, that the waiver of rights was knowing, voluntary, and intelligent.

Third, the federal judiciary should apply a presumption of constitutional invalidity to stipulated orders of removal in both immigration and criminal appeals. This recommendation would most affect collateral attacks in illegal re-entry prosecutions. In immigration matters, federal appeals courts hearing petitions for review in immigration matters may have the

[266] *See supra* note 199.

[267] United States v. Rodriguez-Ocampo, 664 F.3d 1275, 1276 (9th Cir. 2011) (finding that sentencing enhancement "if the defendant previously was deported, or unlawful remained in the United States, after… a conviction for a felony that is.. a crime of violence," USSG 2:1.2(b)(1)(A)(ii), cannot apply where prior order was a stipulated removal order).

[268] *See* Richardson v. United States, 558 F.3d 216 (3d Cir. 2009) (discussing "the presumption that, when there is a written waiver, the waiver is valid, thereby implicitly placing the burden on the alien of proving any claim that the waiver was invalid.").

opportunity to apply the presumption as well, for instance in appeals of motions to reopen before the administrative agency where a stipulated removal order was entered.[269] The presumption might also apply to petitions in which jurisdictional questions rest upon the ability of the noncitizen to have exhausted their administrative remedies, but failed to do so based upon the reasonable perception that the stipulated removal order waived their right to appeal to the BIA.[270]

d. Greater Use of Alternatives to Detention (ATDs) and Voluntary Departure In Lieu of Stipulated Removal Orders

The immigration agency's logic regarding the need for stipulated orders of removal—that the need to alleviate the pressure of limited detention bed space and overcrowded court calendars make them necessary—is short-sighted. It overlooks the fact that the perceived lack of immigration detention space and (to a lesser degree) backlogged courts are themselves creations of the agency. More extensive use of Alternatives to Detention (ATDs), in which ICE physically releases detainees upon the condition of participation in a community-based monitoring programs, could ameliorate the lack of detention bed space.[271] While ICE has voiced a strong interest in making greater use of ATDs in recent years,[272] it has generally focused its efforts on more punitive forms of ATDs, such as ankle monitoring bracelets.[273] However, viable options that would involve releasing immigrants while requiring them to report to community organizations, churches, or other partnering entities, have been attempted and should be explored in further detail.[274] The use of ATDs would also further noncitizens' interest in avoiding prolonged physical detention pending removal.

Similarly, ICE has the discretion to offer voluntary departure to most noncitizens, aside from those facing removal for aggravated felony convictions or terrorist activities, in lieu of or before the completion of removal proceedings.[275] ICE should screen cases to determine whether

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[269] *See* Amicus Brief on Behalf of National Immigration Law Center, Avila-Santoyo v. Holder, No. 11-14941 (11th Cir. 2012). I worked on the amicus brief, which was filed in a case in which the noncitizen appealed the BIA's denial of a motion to reopen a stipulated removal order despite the fact that the noncitizen had resided in the U.S. since the age of two, was statutorily eligible for cancellation of removal, and was a juvenile when he signed the stipulated order.

[270] *See*, *e.g.*, Cordova-Soto v. Holder, 659 F.3d 1029, 1032 (10th Cir. 2011) (holding that court lacked jurisdiction to review stipulated removal order where alien failed to appeal within 30-day deadline for filing petition for review under 8 U.S.C. § 1252(b)(1)).

[271] *See* Detention Watch Network (DWN) and Stanford Law School Immigrants' Rights Clinic, Policy Brief: Community-Based Alternatives to Immigration Detention (August 2010), available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/DWN%20ATD%20Report%20FINAL_08-25-2010.pdf.

[272] *See* Schriro *supra* note 21.

[273] *See* DWN, *supra* note 271, at 7 ("ICE's current programs rely heavily on onerous restrictions including telephonic reporting, curfews, and Global Positioning System (GPS)-enabled electronic monitoring via ankle devices").

[274] *See id.*

[275] 8 U.S.C. § 1229c(a)(1).

it should offer voluntary departure to all detainees who might have been previously offered stipulated orders of removal, instead of vice versa. To be sure, the voluntary departure process itself carries the potential for abuse and coercion.[276] However, instead of opting for stipulated removal and its many defects, ICE should reconsider its use of voluntary departure, which has decreased drastically in the past decade in favor of formal removals.[277]

e. Enhance Agency Transparency

Finally, ICE and EOIR should disclose more information to the public regarding the use of stipulated orders of removal. For instance, both agencies should include statistics on the number of stipulated orders of removal entered in regular publications such as the EOIR Yearbook and DHS reports on enforcement actions. At the local level, too, EOIR and ICE offices could release information regarding its plans to use stipulated removal to the immigration bar, especially non-profit providers, so that know-your-rights materials and other education campaigns can incorporate information on stipulated orders of removal for specific immigrant communities.

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Ultimately, the pressures facing immigration adjudication today – all-time highs in immigration court backlogs, all-time highs in detention, 12 million individuals subject to potential detention and removal, and woeful resource constraints across the immigration courts – find their origins in deeper troubles in the immigration laws that Congressional intervention could remedy. Comprehensive statutory reform, including paths to legalization for those who live in the country without authorization, an expansion of statutory eligibility for discretionary relief, and relaxation of rules related to mandatory detention, could alleviate the forces giving rise to procedures like stipulated orders of removal. Whether Congress will act, however, remains unclear. In the meantime, the executive branch can take steps to prevent stipulated orders of removal from exacerbating the problems in an already broken system.

[276] *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

[277] *See* DHS, 2010 Statistical Yearbook at 94 (showing steady decrease in use of voluntary departure).